CONSOLIDATED CIVIL CASE NOS. H032750, H033544, H034362 and H035056 (LEAD CASE NO. H032750)

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

IN AND FOR SIXTH APPELLATE DISTRICT

* * *

EDWARD WINEMAN, et al.,

Plaintiffs/Cross-Defendants/ Appellants,

v.

CITY OF SANTA MARIA, et al.,

Defendants/Respondents.

Appeal from the Superior Court for Santa Maria County
Superior Court Case Nos.: Santa Maria County Superior Court Lead Case No. 1-97-CV77-214 [*Consolidated with Case Nos. CV784900, CV784921, CV784926, CV785509, CV785511, CV785515, CV785522, CV785936, CV786971, CV787150, CV787151, CV787152, CV790597, CV790599, CV790803, CV 790741]*; San Luis Obispo County Superior Court Case Nos. 990738 and 990739
Honorable Judge Jack Komar

APPELLANTS LANDOWNER GROUP PARTIES' ("LOG") OPENING BRIEF

E. Stewart Johnston, Esq. (Bar #158651)
1363 West Main Street
Santa Maria, CA 93458
Telephone (805) 680-9777

CLIFFORD & BROWN
Richard G. Zimmer, Esq. (Bar #107263)
1430 Truxtun Avenue, Ste. 900
Bakersfield, CA 93301
Telephone (661) 322-6023
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitution

Treatises

TABLE OF ABBREVIATIONS OF PARTIES, GROUPS OF PARTIES AND OTHER TERMS

Appellants	The LOG Parties.
LOG Parties	The parties referred to in pleadings as Landowner Group or LOG. LOG parties are identified as the "Landowner Group Parties (LOG)." in Exhibit 2 of the Judgment. (Judgment Exhibit, C.T.-2, Vol. 2, pg. 439)
Wineman Parties	Parties also appealing this case. The Wineman Parties are identified in as the "Wineman, et al." in Exhibit 2 of the Judgment. (Judgment Exhibit, C.T.-2, Vol. 2, pg. 436) The Wineman Parties are submitting separate briefing.
Santa Maria	The City of Santa Maria.
Nipomo	Nipomo Community Services District. Sometimes abbreviated in pleadings as NCSD.
Rural Water	Rural Water Company.
Golden State	Golden State Water Company. Golden State, sometimes referred to as GSWC, underwent a name change during the pendency of the proceedings and is identified as Southern California Water Company or SCWC in early trial court pleadings.
Pismo	The City of Pismo Beach.
Arroyo Grande	The City of Arroyo Grande.
Grover Beach	The City of Grover Beach.
Oceano	Oceano Community Services District
Guadalupe	The City of Guadalupe.
CCWA	Central Coast Water Authority.

SB County	Santa Barbara County.
SB Water	Santa Barbara County Water Agency.
SB Flood	Santa Barbara County Water and Flood Control District.
SLO County	San Luis Obispo County.
SLO Flood	San Luis Obispo County Water and Flood Control District.
Los Alamos	Los Alamos Community Services District.
Casmalia	Casmalia Community Services District.
Adverse Parties	The parties adverse to LOG in the litigation.
Purveyor Parties	Santa Maria, Golden State, Rural, Nipomo, Oceano, Arroyo Grande, Pismo and Grover Beach styled themselves at various times collectively as the 'Purveyor Parties', Public Water Producers,' 'Public Water Suppliers.' They are a coalition of parties and did not seek class status. Some sued others in the group. Nevertheless, this group of parties cooperated at trial. This brief uses the term 'Purveyor Parties' to refer to this group.
Northern Cities	Oceano, Arroyo Grande, Pismo and Grover Beach employed common counsel and styled themselves collectively as the 'Northern Cities.' They are a coalition of parties and did not seek class status. This brief uses the term 'Northern Cities' to refer to this group. The Northern Cities parties are a sub-group of the 'Purveyor Parties.'
Settlement Stipulation	Stipulation June 30, 2005 Version.
Settling Parties	Those parties to the litigation which signed the Settlement Stipulation.

Writ Petition	Exhibit "A" of the Request For Judicial Notice Attached To The Appellants' Opening Brief: Petition for Writ of Supersedeas, Prohibition, Appropriate Orders and Other Appropriate Relief to Preserve the Status Quo of the Matter Pending Appeal; Request for Temporary Stay
Writ Opposition	Exhibit "B" to the Request For Judicial Notice Attached To The Appellants' Opening Brief: Opposition to Petition for Writs of Supersedeas, Prohibition, or Any Other Order to Preserve the Status Quo Herein Pending Appeal

ABBREVIATIONS OF CITATIONS TO THE RECORD

Appellants' Opening Brief includes 6 appeals under 4 Appellate Case Numbers that have been consolidated for briefing and hearing. Each Appellate Case resulted in a Clerk's Transcript and a Reporter's Transcript. The Record on Appeal required supplemental augmentation several times to add documents and transcripts not initially sent by the trial court or documents which were located after original preparation of the Record on Appeal.

As a result of augmentation, the Record on Appeal is comprised of 16 "Sets" of "Volumes." Each Set contains between 1 and 47 Volumes. The Sets are divided into Sets of Clerk's Transcripts and Reporter's Transcripts. There are 11 Sets of Clerk's Transcripts and 5 Sets of Reporter's Transcripts. For ease of identification, Appellants have marked the first page of each Set in bold type identifying it as a Clerk's Transcript or a Reporter's Transcript. The first page of each Set is attached behind the chart set forth below. As an example, the first Set of Clerk's Transcripts is marked in bold as C.T.-1 and the last Set of Clerk's Transcripts is marked as C.T.-11. The first Set of Reporter's Transcripts is marked as R.T.-1 and the last Set of Reporter's Transcripts is marked as R.T.-5. As noted, each Set includes multiple Volumes.

The chart below is intended to assist the Court in identifying citations to the Record on Appeal. For example, the first Set listed is C.T.-1 (Clerk's Transcript, Set One). Moving to the second column in the chart, the Court will note that Volume 1 of Set 1, starts on Page 1 and ends on Page 252. The last Volume in this Set is Volume 31, which ends on Page 7818. The case numbers and other identifying information are also included on the chart.

By way of example, with reference to a Reporter's Transcript, the first Reporter's Transcript listed on the chart is R.T.-1 (Reporter's Transcript, Set 1). This Set of Reporter's Transcripts starts with Volume 1, starting at Page 1 and ending on Page 6. The last Volume in the Set is Volume 47, which ends at Page 8426.

Although not addressed on the chart below, there also is potential for confusion regarding exhibits. Phase 1 was resolved without trial. Consequently, there are no Phase 1 exhibits. Based upon Appellants' review of the trial exhibits on file with this Court, it does not appear that any Phase 2 exhibits were transmitted by the trial court. Appellants have not cited Phase 2 exhibits in Appellants' Opening Brief. Trial exhibits which were transferred directly by the trial court to this Court have been separated by this Court into Phases 3 through 5. However, examination of the exhibits reveals overlap of exhibit numbers between Phases. For example, there may be an Exhibit "A" in Phase 3 and an Exhibit "A" in Phase 4. Accordingly, to clarify the precise exhibit to which Appellants are referring in Appellants' Opening Brief, Appellants will refer to both the Phase and the exhibit identification in the citation. As an example, for Exhibit A-1 introduced in Phase 3, the citation would read as follows: (Phase 3, Exhibit A-1).

Abbre-viation For each Set of Volumes	Volume One First page Number Last page Number Last Volume in Set Last page Number	Case numbers on first page of the first Volume of the Set	Notice Of Appeal Filed Date:	Notice Of Comple tion Filed Date:	Clerk's Certifi-cation Date:
C.T.-1	(C.T.-1, Vol. 1, pg. 1) (C.T.-1, Vol. 1, pg. 252) (C.T.-1, Vol. 31, pg. 7818)	H032750 1-97 CV770214	3/21/08	2/19/09	12/10/08
C.T.-2	(C.T.-2, Vol. 1, pg. 1) (C.T.-2, Vol. 1, pg. 299) (C.T.-2, Vol. 2, pg. 563)	H032750 1-97 CV770214	3/21/08	None	3/9/09
C.T.-3	(C.T.-3, Vol. 1, pg. 1) (C.T.-3, Vol. 1, pg. 290) (C.T.-3, Vol. 5, pg. 1256)	H032750 1-97 CV770214	3/21/08	6/1/09	None

Abbre-viation For each Set of Volumes	Volume One First page Number Last page Number Last Volume in Set Last page Number	Case numbers on first page of the first Volume of the Set	Notice Of Appeal Filed Date:	Notice Of Comple tion Filed Date:	Clerk's Certifi-cation Date:
C.T.-4	(C.T.-4, Vol. 1, pg. 1) (C.T.-4, Vol. 1, pg. 250) (C.T.-4, Vol. 10, pg. 2533)	H033544 1-97 CV770214	11/12/08	None	6/4/09
C.T.-5	(C.T.-5, Vol. 1, pg. 1) (C.T.-5, Vol. 1, pg. 175) (C.T.-5, Vol. 2, pg. 310)	H033544 1-97 CV770214	11/4/08	8/3/09	8/3/09
C.T.-6	(C.T.-6, Vol. 1, pg. 1) (C.T.-6, Vol. 1, pg. 284)	H034362 1-97 CV770214	6/5/09	8/5/09	7/28/09
C.T.-7	(C.T.-7, Vol. 1, pg. 1) (C.T.-7, Vol. 1, pg. 260) (C.T.-7, Vol. 18, pg. 4922)	H032750 1-97 CV770214	3/21/08	9/18/09	8/27/09

Abbre-viation For each Set of Volumes	Volume One First page Number Last page Number Last Volume in Set Last page Number	Case numbers on first page of the first Volume of the Set	Notice Of Appeal Filed Date:	Notice Of Comple tion Filed Date:	Clerk's Certifi-cation Date:
C.T.-8	(C.T.-8, Vol. 1, pg. 1) (C.T.-8, Vol. 1, pg. 283) (C.T.-8, Vol. 3, pg. 868)	H032750 1-97 CV770214	3/21/08	9/28/09	None
C.T.-9	(C.T.-9, Vol. 1, pg. 869) (C.T.-9, Vol. 1, pg. 980)	H032750 1-97 CV770214	3/21/08	9/28/09	None
C.T.-10	(C.T.-10, Vol. 1, pg. 1) (C.T.-10, Vol. 1, pg. 291) (C.T.-10, Vol. 4, pg. 1199)	H032750 1-97 CV770214	None	6/23/10	6/21/10
C.T.-11	(C.T.-11, Vol. 1, pg. 1) (C.T.-11, Vol. 1, pg. 212)	H035056 1-97 CV770214	12/8/09	3/24/10	3/24/10

Abbre-viation For each Set of Volumes	Volume One First page Number Last page Number Last Volume in Set Last page Number	Case numbers on first page of the first Volume of the Set	Notice Of Appeal Filed Date:	Notice Of Completion Filed Date:	Clerk's Certification Date:
R.T.-1	(R.T.-1, Vol. 1, pg. 1) (R.T.-1, Vol. 1, pg. 6) (R.T.-1, Vol. 47, pg. 8426)	H032750 1-97 CV770214	For 3/26/98	To	4/4/08
R.T.-2	(R.T.-2, Vol. 1, pg. 1) (R.T.-2, Vol. 1, pg. 201)	1-97-CV770214	For 4/4/08	6/13/08	9/5/08
R.T.-3	(R.T.-3, Vol. 1, pg. 1) (R.T.-3, Vol. 1, pg. 7)	1-97-CV770214	For 5/22/09		
R.T.-4	(R.T.-4, Vol. 1, pg. 1) (R.T.-4, Vol. 1, pg. 42)	1-97-CV770214	For 510/3/08	12/18/08	
R.T.-5	(R.T.-5, Vol. 1, pg. 1) (R.T.-5, Vol. 1, pg. 6)	1-97-CV770214	For 9/8/09		

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-1

SANTA MARIA GROUND WATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	NO. SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 31 PAGES 1 thru 252

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/ CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: March 21, 2008
NOTICE OF COMPLETION FILED: FEB 19 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-2

SANTA MARIA GROUND WATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	NO. H032750 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 2 PAGES 1 thru 299

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/ CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: March 21, 2008

NOTICE OF COMPLETION FILED: _____

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APELLATE DISTRICT

C.T.-3

SANTA MARIA GROUNDWATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	Appellate Case No. H032750 SANTA CLARA COUNTY NO. 1-97-CV770214 VOL. 1 of 5 PAGES 1 thru 290

AUGMENTED RECORD ON APPEAL
[EXHIBITS TO LOG'S MOTION TO AUGMENT/CORRECT RECORD ON APPEAL]

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT O THE STATE OF CALIFORNIA, INA ND FOR THE COUNTY OF SANTA CLARA.

HONORABLE **JACK KOMAR**, JUDGE

APEPARANCES:

FOR APPELLANT/WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: MARCH 21, 2008

NOTICE OF COMPLETION FILED: JUNE 1, 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-4

SANTA MARIA GROUNDWATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	NO. H033544 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 10 PAGES 1 thru 250

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.
HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ LANDOWNER GROUP PARTIES

RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
CLIFFORD & BROWN
1430 TRUXTON AVE., STE. 900
BAKERSFIELD, CA 93301

FOR RESPONDENT/ CITY OF SANTA MONICA

STEPHANIE HEDLUND, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: November 12, 2008
NOTICE OF COMPLETION FILED: _____

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-5

SANTA MARIA VALLEY WATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	NO. H033544 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 2 PAGES 1 thru 175

CORRECTIONS/ ADDITIONS

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ LANDOWNER GROUP PARTIES (LOG0

RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
CLIFFORD & BROWN
1430 TRUXTON AVE., STE. 900
BAKERSFIELD, CA 93301

FOR RESPONDENT/ GOLDEN STATE WATER COMPANY & RURAL WATER COMPANY

ROBERT J. SAPERSTEIN, ESQ.
STEPHANIE OSLER HASTINGS, ESQ.
BROWNSTEIN HYATT, ET AL.
21 E. CARRILLO STREET
SANTA BARBARA, CA 93101

NOTICE OF APPEAL FILED: November 04, 2008

NOTICE OF COMPLETION FILED: 5/13/09

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-6

SANTA MARIA VALLEY WATER Plaintiff(s) V. CITY OF SANTA MARIA Defendant(s)	NO. H034362 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 1 PAGES 1 thru 284

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ LANDOWNER GROUP PARTIES (LOG)

RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
CLIFFORD & BROWN
1430 TRUXTON AVE., STE. 900
BAKERSFIELD, CA 93301

FOR RESPONDENT/ GOLDEN STATE WATER COMPANY

ROBERT J. SAPERSTEIN, ESQ.
STEPHANIE OSLER HASTINGS, ESQ.
BROWNSTEIN HYATT FARBER & SCHRECK LLP
21 E. CARRILLO STREET
SANTA BARBARA, CA 93101

NOTICE OF APPEAL FILED: June 05, 2009

NOTICE OF COMPLETION FILED: AUG 0 5 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-7

SANTA MARIA GROUND WATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	NO. H032750 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 18 PAGES 1 thru 260

AUGMENTATION
CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/ CITY OF SANTA MARIA

JEFFREY V. DUNN, ESQ.
STEPHANIE HEDLUND, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

CONTINUED ON NEXT PAGE

NOTICE OF APPEAL FILED: March 21, 2008

NOTICE OF COMPLETION FILED: SEP 18 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APELLATE DISTRICT

SANTA MARIA GROUNDWATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	Appellate Case No. H032750 SANTA CLARA COUNTY NO. 1-97-CV770214 **C.T.-8** VOL. 1 of 3 PAGES 1 thru 283

AUGMENTED RECORD ON APPEAL
[EXHIBITS TO LOG'S MOTION TO AUGMENT RECORD ON APPEAL TO INCLUDE ADDITIONAL DOCUMENTS/PLEADINGS FROM THE CLERK'S TRANSCRIPT WHICH HAVE NOT YET BEEN MADE PART OF THE RECORD ON APPEAL]

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT O THE STATE OF CALIFORNIA, INA ND FOR THE COUNTY OF SANTA CLARA.

HONORABLE **JACK KOMAR**, JUDGE

APEPARANCES:

FOR APPELLANT/WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: MARCH 21, 2008

NOTICE OF COMPLETION FILED: SEPTEMBER 28, 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APELLATE DISTRICT

SANTA MARIA GROUNDWATER Plaintiff(s) V. CITY OF SANTA MARIA, ET AL. Defendant(s)	Appellate Case No. H032750 SANTA CLARA COUNTY NO. 1-97-CV770214 **C.T.-9** VOL. 1 of 1 PAGES 869 thru 980

AUGMENTED RECORD ON APPEAL
[EXHIBITS TO LOG'S MOTION TO AUGMENT/CORRECT RECORD ON APPEAL TO INCLUDE COMPLETE REPORTER'S TRANSCRIPT, CLERK'S TRANSCRIPT AND ALL TRIAL EXHIBITS]

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT O THE STATE OF CALIFORNIA, INA ND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APEPARANCES:

FOR APPELLANT/WINEMAN PARTIES

TED R. FRAME, ESQ.
RUSSELL MATSUMOTO, ESQ.
FRAME & MATSUMOTO
201 WASHINGTON STREET
P.O. BOX 895
COALINGA, CA 93210-1552

FOR RESPONDENT/CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KREIGER
P.O. BOX 1028
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: MARCH 21, 2008

NOTICE OF COMPLETION FILED: SEPTEMBER 28, 2009

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-10

SANTA MARIA GROUNDWATER ET AL. Plaintiff(s)	NO. H032750
V.	SANTA CLARA COUNTY NO. 1-97 CV770214
CITY OF SANTA MARIA, ET AL.	VOL. 1 of 4
Defendant(s)	PAGES 1 thru 291

AUGMENTATION

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE **JACK KOMAR**, JUDGE

APPEARANCES:

FOR APPELLANT/ X-DEFENDANT / X-COMPLAINANT - EDWARD WINEMAN, ET AL.

TED R. FRAME
FRAME & MATSUMOTO
201 WASHINGTON STREET
COALINGA, CA 93210

FOR RESPONDENT/ X-DEFENDANT / X-COMPLAINANT - CITY OF SANTA MARIA, ET AL.

ERIC L. GARNER
JEFFREY V. DUNN
JILL N. WILLIS
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CA 92614

NOTICE OF COMPLETION FILED: JUN 2 8 2010

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

C.T.-11

SANTA MARIA VALLEY WATER Plaintiff(s) V. CITY OF SANTA MARIA Defendant(s)	NO. H035056 SANTA CLARA COUNTY NO. 1-97 CV770214 VOL. 1 of 1 PAGES 1 thru 212

CLERK'S TRANSCRIPT

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA.

HONORABLE JACK KOMAR, JUDGE

APPEARANCES:

FOR APPELLANT/ LANDOWNER GROUP PARTIES (LOG)

RICHARD G. ZIMMER, ESQ.
T. MARK SMITH, ESQ.
CLIFFORD & BROWN
1430 TRUXTON AVE., STE. 900
BAKERSFIELD, CA 93301

FOR RESPONDENT/ CITY OF SANTA MARIA

ERIC L. GARNER, ESQ.
JEFFREY V. DUNN, ESQ.
JILL N. WILLIS, ESQ.
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVE., STE. 400
RIVERSIDE, CA 92502

NOTICE OF APPEAL FILED: December 08, 2009

~~NOTICE OF COMPLETION FILED:~~ MAR 2 4 2010

R.T.-1

COPY

TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

---o0o---

SANTA MARIA VALLEY WATER CONSERVATION DISTRICT, et al.,

Plaintiff and Respondent

vs.

LANDOWNER GROUP PARTIES, et al.

Defendants and Appellants

---o0o---

REPORTER'S TRANSCRIPT ON APPEAL

FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA

---o0o---

(SANTA CLARA COUNTY SUPERIOR COURT NO. CV770214)

Volume One
Proceedings of March 26, 1998 and July 30, 1998
Pages 1 through 6, inclusive

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

---000---**R.T.-2**

SANTA MARIA VALLEY WATER CONSERVATION DISTRICT, A PUBLIC ENTITY, PLAINTIFF, VS. CITY OF SANTA MARIA, ETC., ET AL., DEFENDANTS.	NO. SANTA CLARA COUNTY LEAD CASE NO. 1-97-CV770214

REPORTER'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

HONORABLE JACK KOMAR, JUDGE

APRIL 4, JUNE 13
AND
SEPTEMBER 5, 2008

VOLUME 1

PAGES: 1 - 201

FOR THE APPELLANT:

E. STEWART JOHNSTON, ESQ.,
CLIFFORD AND BROWN, AND
FRAME & MATSUMOTO

FOR THE RESPONDENTS:

BROWNSTEIN, HYATT ET AL.,
RICHARDS WATSON & GERSHON,
BEST, BEST & KRIEGER, AND
NOSSAMAN, GUTHNER, KNOX & ELLIOTT

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

---000---

R.T.-3

COPY

SANTA MARIA VALLEY WATER CONSERVATION DISTRICT, A PUBLIC ENTITY, PLAINTIFF, VS. CITY OF SANTA MARIA, ETC., ET AL., DEFENDANTS.	NO. SANTA CLARA COUNTY LEAD CASE NO. 1-97-CV770214

REPORTER'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

HONORABLE JACK KOMAR, JUDGE

MAY 22, 2009

VOLUME 1

PAGES: 1 - 7

FOR THE APPELLANT:

E. STEWART JOHNSTON, ESQ.,
CLIFFORD AND BROWN, AND
FRAME & MATSUMOTO

FOR THE RESPONDENTS:

BROWNSTEIN, HYATT ET AL.,
RICHARDS WATSON & GERSHON,
BEST, BEST & KRIEGER, AND
NOSSAMAN, GUTHNER, KNOX & ELLIOTT

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

---000---

R.T.-4

SANTA MARIA VALLEY WATER CONSERVATION DISTRICT, A PUBLIC ENTITY, PLAINTIFF, VS. CITY OF SANTA MARIA, ETC., ET AL., DEFENDANTS.	NO. SANTA CLARA COUNTY LEAD CASE NO. 1-97-CV770214

REPORTER'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

HONORABLE JACK KOMAR, JUDGE

OCTOBER 3 AND DECEMBER 18, 2008

(AUGMENTATION)

VOLUME 1

PAGES: 1 - 42

FOR THE APPELLANT:

E. STEWART JOHNSTON, ESQ.,
CLIFFORD AND BROWN, AND
FRAME & MATSUMOTO

FOR THE RESPONDENTS:

BROWNSTEIN, HYATT ET AL.,
RICHARDS WATSON & GERSHON,
BEST, BEST & KRIEGER, AND
NOSSAMAN, GUTHNER, KNOX & ELLIOTT

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

R.T.-5

COPY

---o0o---

SANTA MARIA VALLEY WATER,
PLAINTIFF-RESPONDENT,

VS.

CITY OF SANTA MARIA,
DEFENDANT-APPELLANT.

SANTA CLARA CO

CASE NO: 1-97-CV 770214

REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SANTA CLARA
THE HONORABLE JACK KOMAR, JUDGE

SEPTEMBER 8, 2009

APPEARANCES:

FOR APPELLANT:

FOR RESPONDENT:

INTRODUCTION

(A) The Scope And Importance Of The Matters At Issue.

This case will profoundly affect the groundwater rights of hundreds of parties in the Santa Maria Groundwater Basin located in Santa Barbara and San Luis Obispo Counties. The dispute in the underlying action is unique both in terms of the breadth of procedural, factual and legal issues presented as well as the paucity of cases that have addressed the issues presented. As such, this case presents issues critical to the evolution of California groundwater law and involves numerous issues of first impression.

(B) The Underlying Action.

In the years leading up to July 14, 1997, various municipal purveyors of water, hereinafter the Purveyor Parties, alleged that the Santa Maria Water Basin was substantially over committed and had been for many decades. In legal terms, they claimed the water basin was in "overdraft." These purveyors asserted they had prescriptively taken groundwater rights from overlying landowners.

As a result, on July 14, 1997, the Santa Maria Water Conservation District filed an action to these uncertainties. The Purveyor Parties filed declaratory relief actions, requesting a determination that the Basin was in overdraft, seeking a determination of the water rights of all parties in the Santa Maria Basin and for an injunction to prevent parties from pumping in excess of their rights and for a physical solution to equitably control pumping of the various parties.

(C) Summary Of Argument.

Appellants contend the trial court erred in denying quiet title relief because the court required proof by Appellants not required by statute and the common law. Appellants also contend the court erred in failing to enter judgment against Purveyor Parties on numerous claims made in Purveyor

Parties' declaratory relief causes of action which are not reflected in the Judgment. In summary, the trial court erred in failing to declare the rights of all groundwater users as requested in the pleadings.

The trial court found no basis for a prescription claims in the Phase 3 Trial based upon the correct legal standard, then found prescription in the Phase 4 Trial based upon the wrong legal standard. Accordingly, the trial court erred in failing to enter judgment denying the prescription claims.

The trial court erred in awarding imported water rights to Purveyor Parties and in awarding water rights to Purveyor Parties not recognized by California law.

The trial court failed to enter judgment against defaulting parties and against parties which disclaimed adverse rights. The trial court also failed in the declaratory relief Judgment to protect the rights of Appellants under continuing jurisdiction and erred in denying Appellants' rights to groundwater in the northern area of the Basin.

The court improperly *reduced* the Settlement Stipulation to judgment. The trial court also improperly *combined* Settlement Stipulation with Appellants' Judgment After Trial.

The court also erred in imposing a physical solution in the absence of a proper basis for a physical solution. The court erred in imposing terms of the Settlement Stipulation on Appellants as a so called physical solution since Appellants did not sign the Settlement Stipulation.

The trial court erred in failing to require proper recordation of the Judgment by legal description and erred in awarding costs. Finally, post-trial rulings and/or orders violated the stay on appeal. Such rulings and orders improperly affect the groundwater rights of Appellants herein.

(D) <u>Limited Joinder In Opening Brief Of Appellants The Wineman Parties.</u>

Appellants' join in the Opening Brief by Appellants the Wineman

Parties to the extent that it does not conflict factually or legally with Appellants' Opening Brief.

STATEMENT OF APPEALABILITY

This appeal is from a final Judgment from and certain post-judgment orders in the trial court.

The action was tried without a jury and culminated in a final judgment on January 25, 2008. (Judgment, C.T.-2,Vol.1,pg.1) Appellants appealed the lower court Judgment on March 20, 2008. The Court of Appeal Case Number is in Case No. H032750.

Appellants also appealed the trial court's post-trial rulings and orders. (C.T.-4,Vol.9,pg.2164) (C.T.-4,Vol.9,pg.2163) (C.T.-4,Vol.9,pg.2160) (C.T.-6,Vol.1,pg.152) (C.T.-11,Vol.1,pg.73)

The Court of Appeal consolidated the appeals of these post-trial orders with the appeal from the Judgment After Trial for purposes of briefing and oral argument.

These appeals finally dispose of all issues to date between the parties.

PROCEDURAL HISTORY

In 1997, the Santa Maria Valley Water Conservation District, a public agency, filed a Complaint naming entities, referred to at various times throughout the litigation as 'Purveyor Parties' or 'Public Water Producers', as defendants. (Santa Maria Valley Water Conservation District Complaint, C.T.-1,Vol.1,pg.1)

The 'Purveyor Parties' filed Cross-Complaints naming other public entities and naming hundreds of other persons and entities who were alleged to have groundwater rights. (Santa Maria Cross-Complaint, C.T.-1,Vol.27,pg.7001) (Golden State Cross-Complaint, C.T.-1,Vol.1,pg.236) (Rural Water Cross-Complaint, C.T.-1,Vol.3,pg.662) (Pismo, Arroyo

Grande, Grover Beach, Oceano Cross-Complaint, C.T.-1,Vol.11,pg.2938) (Nipomo Cross-Complaint, C.T.-1,Vol.2,pg.268)

Appellants, primarily farmers identified as the Landowner Group or 'LOG', were named as cross-defendants to these Cross-Complaints or filed their own Complaints to quiet title to their overlying groundwater rights. (LOG Cross-Complaint, C.T.-1,Vol.6,pg.1419)

The trial court bifurcated the issues for trial into phases:

> Phases 1 And 2: Basin Boundary.
>
> Phase 3: Overdraft.
>
> Phase 4: Trial Of All Causes Of Action.
>
> Phase 5: Purveyor Parties Request That Appellants Be Bound By The Settlement Stipulation As A Physical Solution And Self Help As A Defense To Purveyor Parties' Prescription Claims.

The Judgment After Trial was filed on January 25, 2008. (Judgment, C.T.-2,Vol.1,pg.1) Post-trial rulings and orders were made by the trial court.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING QUIET TITLE RELIEF TO APPELLANTS

(A) Introduction.

In the underlying action, Appellants requested quiet title of their overlying groundwater rights as against alleged claims of prescription or other challenges by the Purveyor Parties. By contrast, the Purveyor Parties, expansive pleadings requested a determination and quantification of all rights of all parties (see discussion below). Appellants request for relief was limited to quieting title to specific properties against any adverse claims of the Purveyor Parties. Appellants Cross-Complaint provides:

> Cross-Complainant seeks to quiet title to the superior priority of its right to extract and put to reasonable and beneficial use groundwater from the Basin on the Plantel Nurseries Property against the claims of each of the Cross-Defendants to a superior or co-equal right to extract and use groundwater from the Basin for non-overlying use. (C.T.-1,Vol.6,pg.1427:16-19)

Appellants did not request any specific quantity of water nor did they seek to reduce pumping of any party. Instead they requested a declaration that the Purveyor Parties had not diminished Appellants' overlying groundwater priority right.

(B) Quiet Title Was, And Is, An Appropriate Procedure To Resolve Claims Against Overlying Groundwater Rights.

Quiet Title has long been approved as an appropriate cause of action to resolve disputes about water. See, *e.g.*, *City of Los Angeles v. City of San Fernando*, (1975) 14 Cal.3d 199, 207 *(San Fernando)*. As discussed below, overlying water rights are property, part and parcel to the land, appurtenant to ownership of the land and therefore an interest in land. The Quiet Title Statute is specifically intended to resolve disputes about property.

Code of Civil Procedure §760.020 was enacted to establish a procedure to "establish title against adverse claims to real or personal property or any interest therein".

(C) The Trial Court Confirmed On Demurrer That Quiet Title Is A Proper Cause Of Action.

The Purveyor Parties and others demurred to the quiet title cause of action. The court overruled the Demurrer stating:

> ...groundwater rights are real property rights and, therefore, are appropriate subject matter for a quiet title action. See *City of Barstow v. Mojave Water Agency.*
> (C.T.-1,Vol.6,pg.1516:23-24)

(D) Appellants Properly Proved A Claim For Quiet Title.

Appellants presented evidence in the Phase 4 trial of their fee ownership of parcels of land in the Santa Maria Water Basin. These parcels were identified by legal description as required by the quiet title statute. (C.T.-1,Vol.6,pg.1436)

The Purveyor Parties stipulated to Appellants' fee ownership of these properties and the trial court confirmed fee ownership in the Judgment. (C.T.-2,Vol.1,pg.6:21-22) and (C.T.-2,Vol.1,pg.4:8-9) Fee ownership includes the appurtenant right to pump groundwater. *Stanford v. Felt* (1886) 71 Cal. 249, 250; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241 *(Mojave); City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 *(Pasadena).*

(E) Proof Of Fee Ownership Of The Properties Shifted The Burden To The Purveyor Parties To Prove, By Clear And Convincing Evidence, Any Prescription Claims Or Other Challenges To Appellants' Overlying Groundwater Rights.

Code of Civil Procedure §761.030 requires a defendant to a quiet title action to specifically set forth in a verified answer "Any claim the defendant has." The Purveyor Parties asserted a variety of claims including prescription.

Upon proof of fee ownership, the burden of proof of any prescriptive claim lies with the party challenging title. *Tobin v. Stevens* (1988) 204 Cal.App.3d 945, 953. "It is settled that the presumption of ownership is with the paper title and clear evidence must be produced to overcome that presumption." (*Mosk v. Summerland Spiritualist Assn.* (1964) 22 Cal.App.2nd 376, 381-382)

The burden of proof always remains with the party claiming prescription regardless of who raises the issue because of the statutory presumption that the record owner has possession including all the

attributes of possession. *Code of Civil Procedure* §321.

Prescription must be proved by clear and convincing evidence. (*Clarke v. Clarke* (1901) 133 Cal. 667, 669, *Nelson v. Robinson* (1941) 47 Cal.App.2d 520, (*Hahn v. Curtis* (1946) 73 Cal.App.2d 382, 389, *Landini v. Day* (1968) 264 Cal.App.2d 278, 282 .

Clear and convincing evidence is necessary because:

> Equity abhors a forfeiture and all presumptions favor the record owner of the property. .... all doubts are resolved against the adverse possessor, ...
> (*Marriage v. Keener* (1994) 26 Cal.App.4th 186, 192-193.)

The court properly ruled in Phase 3, that Purveyor Parties had the burden of proving overdraft and prescription by clear and convincing evidence. (Phase 3 Decision, C.T.-1,Vol.17,pg.4413:15-4414:16)

(F) <u>The Trial Court Erred In Failing To Enter Judgment Against Seven Parties Which Disclaimed Any Challenge To Appellants' Overlying Groundwater Rights.</u>

Quiet title defendants may disclaim any challenge to title and to thereby escape a cost judgment. *Code of Civil Procedure* §761.030(b). The following parties disclaimed any challenge to Appellants' overlying groundwater rights: Casmalia (C.T.-1,Vol.10,pg.2628), Los Alamos (C.T.-7,Vol.2,pg.489), Santa Barbara County Water & Flood Control District, Santa Barbara Water Agency (C.T.-1,Vol.14,pg.3834), San Luis Obispo County and San Luis Obispo Water & Flood Control District (C.T.-1,Vol.10,pg.2474).

(G) <u>The Trial Court Erred In Failing To Enter Judgment Against Guadalupe Which Failed To Appear At Trial.</u>

The City of Guadalupe (C.T.-1,Vol.2,pg.496) was a Cross-Defendant to Appellants' quiet title action. Guadalupe did not appear at

trial to prove any adverse claims.

(H) The Trial Court Erred In Failing To Enter Quiet Title Judgment Against Seven Parties Which Appeared At Trial But Failed To Present Any Evidence Of Pumping To Support A Claim Of Prescription.

The Cities of Pismo Beach, Grover Beach, Arroyo Grande and Oceano CSD, Nipomo CSD, CCWA and Rural Water Company pleaded adverse claims including prescription. They appeared at trial but failed to present any evidence of pumping during the alleged prescriptive periods which evidence would be necessary to support a claim of prescription. The trial court properly awarded these parties no prescriptive right but erred in failing to quiet title against these Cross-Defendants.

(I) The Trial Court Erred In Failing To Enter A Quiet Title Judgment Against Santa Maria And Golden State Water Company.

The trial court found that two Purveyor Parties, Santa Maria and Golden State, proved prescriptive rights. No other adverse rights were proved by any party.

A claim of prescription requires proof of the scope of the claimed prescriptive right which is defined by "uses which were made ..... during the prescriptive period." (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 155) See also *Civil Code* §806

The Judgment declares that:

> The City of Santa Maria established total adverse appropriation of 5,100 acre feet per year and Golden State Water Company established adverse appropriation of 1900 acre feet per year, measured against all usufructuary rights within the Santa Maria Basin.
> (Judgment, C.T.-2,Vol.1,pg.5:20-22)

The trial court also found that only a "proportionate quantity" of such rights may be asserted against non stipulating parties, including Appellants herein. (Judgment, C.T.-2,Vol.1,pg.5:25)

The trial court provided an example to demonstrate the "limited right" acquired by these Purveyors Parties stating:

> To demonstrate the limited right acquired by the City of Santa Maria and Golden State Water Company, by way of example, if the cumulative usufructuary rights of the LOG and Wineman Parties were 1,000 acre-feet and the cumulative usufructuary rights of all other overlying groundwater right holders within the Basin were 100,000 acre-feet, the City of Santa Maria and Golden State Water Company would each be entitled to enforce 1% of their total prescriptive right against the LOG and Wineman Parties. That is, Golden State Water Company could assert a prescriptive right of 19 annual acre-feet, and the City of Santa Maria 51 annual acre-feet, cumulatively against the LOG and Wineman Parties, each on a proportionate basis as to each LOG and Wineman Party's individual use.
> (Judgment, C.T.-2,Vol.1,pg.5:25-6:6)

Because the City of Santa Maria and Golden State Water Company failed completely to prove the "cumulative usufructuary rights of Appellants and the Wineman Parties" and failed completely to prove the "cumulative usufructuary rights of all other overlying groundwater right holders within the Basin," the court had no pumping data and was forced to use theoretical pumping numbers.

The trial court correctly recognized that the scope of the prescriptive right was not proved stating:

> The effect of that adverse appropriation on the LOG's and Wineman parties' rights cannot be determined without evidence of the extent of the LOG's and Wineman parties' (and all other water producers) water rights within this single basin aquifer.
> (Phase 5 Decision, C.T.-1,Vol.28,pg.7137:22-24)

> Without a quantification of the pumping history of the LOG and Wineman parties, as well as any other water producers, the court at this time cannot determine the effect that prescription has on any such other water producer or party.
> (Phase 5 Decision, C.T.-1,Vol.28,pg.7141:11-13)

In the absence of this critical proof, the Purveyor Parties were unable to prove the magnitude of the prescriptive loss of Appellant's overlying groundwater rights.

Additionally, the scope a prescriptive right is based upon conduct, in this case pumping, which must occur during the prescriptive period. *O'Banion v. Borba, supra,* at p. 155. See also *Civil Code* §806. The scope of the prescriptive right cannot be based upon future pumping which did not occur during the prescriptive period. The trial court suggested that the diminishment of Appellants overlying groundwater right was small and probably *de minimus*. (Phase 5 Decision, C.T.-1,Vol.28,pg.7139:15-16) However, this suggestion does not change the fact that Santa Maria and Golden State failed to prove the magnitude of the prescriptive loss of Appellants' overlying water rights.

In the face of Purveyor threats of prescription, Appellants filed a quiet title action to resolve, one way or the other, whether prescription had operated to diminish Appellants' overlying rights and, if so, the magnitude of the prescriptive loss. The trial court erred in failing to fully resolve the issues raised in Appellants' Quiet Title cause of action.

(J) <u>The Trial Court Erred In Reversing The Burden Of Proof.</u>

The trial court found that Appellants failed to prove their quiet title cause of action stating:

> The LOG and Wineman Parties have failed to sustain the burden of proof in their action to quiet title to the quantity of their ground water rights .....
> (Judgment, C.T.-2,Vol.1,pg.6:17-18)

As demonstrated above, landowners seeking to quiet title need only prove record title, which as a matter of law includes the appurtenant right to pump groundwater. The trial court acknowledged that Appellants proved record title stating:

> Legal title to said real property is vested in the LOG and Wineman Parties and was not in dispute in this action. (C.T.-2,Vol.1,pg.6:21-22)

Further, the trial court recognized that record title includes the appurtenant right to pump groundwater. As the court noted:

> The court declines to use the quiet title remedy to quiet title to the water underlying the land of the Land Owner parties at this time. The **court acknowledges that certain water rights are appurtenant to each of the parcels owned (as stipulated) by the Land Owner parties**, but the court at this time cannot define what those rights are since every land owner in the basin has certain correlative rights to the basin's limited native supply, **except as such rights may have been eroded by prescription or otherwise**. The Land Owners failed to join the other land owners as cross-defendants. (Phase 4 Decision, C.T.-1,Vol.28,pg.7151:18-24)

The trial court properly recognized the appurtenant right but erroneously concluded that Appellants were required to prove the quantity of that right *vis a vie* other landowners. Appellants did not plead nor request quantification of the quantity of their overlying right as against other landowners or against the Purveyor Parties. Appellants simply requested a quiet title declaration confirming that the overlying right had not been eroded by prescription or otherwise. (C.T.-1,Vol.6,pg.1423:20-1427:20) Accordingly, it was unnecessary for Appellants to prove the quantity of their rights and unnecessary to join other landowners as cross-defendants.

(K) The Trial Court Erred In Assigning An Unnecessary Element Of Proof To Quiet Title And/Or Attributed Unrequested Relief To Appellants' Quiet Title Claim.

The court stated in the Judgment:

> The LOG and Wineman Parties have failed to sustain the burden of proof in their action to quiet title to the ***quantity*** of their ground water rights ....
> (C.T.-2,Vol.1,pg.6:17-18)(Emphasis added.)

Consistent with the flexible nature of the overlying right, as discussed below, Appellants **did not plead nor request** a quiet title declaration to **any specific quantity of water**. Instead, Appellants requested only that the trial court quiet title to Appellants undiminished overlying groundwater right to confirm that the right was not eroded by prescription or otherwise. (C.T.-1,Vol.6,pg.1423:20-1427:20)

The overlying pumping right is not fixed, but rather, flexible, depending upon the needs of the landowner at any given time. It would be inconsistent with the overlying groundwater right and detrimental to a landowner, such as a farmer, to request a specific quantity of water. The amount of water necessary will vary over time given the number of acres in production and the type of crops being grown. Accordingly, proof of pumping quantity was not required, nor appropriate.

Likewise, reserving a specific quantity of water to a landowner even when such water is not needed, would defeat the purpose of Article X, Section 2 of the *California Constitution* which requires maximum use of groundwater and allows appropriators to use surplus water when it is not needed by the overlying owner.

(L) Quiet Title Is Available In Situations Where No Shortage Exists And Where No Quantification Is Necessary Or Requested.

The Court in *San Fernando*, citing the case of *City of Los Angeles v.*

City of Glendale (1943) 23 Cal.2d 68, 76 *(Glendale)* thirty years earlier, both quiet title actions, approved the use of quiet title as an appropriate remedy where, as in this case, a surplus existed and no injunction was being sought to cut back pumping or to allocate water in quantitative terms.

> In Glendale plaintiff did not seek injunctive relief because the basin contained a surplus of water over and above the amounts being beneficially used. (23 Cal.2d at pp. 78-79.) The purpose of that action was not to protect rights in water already being used -- there then being enough water for all -- but to preserve a potential right to water that would be required for plaintiff's future needs. (23 Cal.2d at pp. 74-75.) Plaintiff was following the procedure appropriate for protecting such a potential right against prescriptive claims by appropriators.
> (*San Fernando, supra,* at 268.)

(M) <u>Quiet Title Is Available Even Where Quantities Will Vary In The Future.</u>

The fact that supplies and demands are variable does not prevent a court from confirming a priority.

> A riparian right also extends to the future reasonable beneficial uses of water. For this reason too, [a]s against an appropriator, a riparian owner is accorded a fixed priority of right. But the quantity of water to which the right attaches remains unfixed. Thus, an expanded riparian use has the potential to preempt an inferior appropriative right where the supply of water originally was sufficient to satisfy both uses.
> (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 777.)

Where the supply is overcommitted, a court must limit supply to preserve the resource and must allocate the limited supply in quantitative terms. But where, as in the underlying action, the supply is in surplus, no quantification is needed, nor is quantification appropriate.

(N) <u>The Trial Court Erred In Failing To Quiet Title Resulting In A Cloud On Appellants' Title.</u>

A trial court is required to resolve a quiet title claim. *Code of Civil Procedure* §764.010 provides that "The court shall render judgment in accordance with the evidence and the law."

Appellants' quiet title actions alleged that prescriptive claims were being asserted by various parties to the underlying action. (C.T.-1,Vol.6,pg.1424:22-27) The Purveyor Parties asserted prescriptive and other claims against Appellants' title in their responsive pleadings. The Quiet Title statutes were intended by the Legislature to create a procedure whereby a property owner may resolve claims against title. *Code of Civil Procedure* §760.020. "Claim" includes a "cloud upon title." *Code of Civil Procedure* §760.010.

The object of a quiet title action is to determine with finality any claims against the attributes of title to the property. As noted by the court in *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278:

> A quiet title action seeks to declare the rights of the parties in realty. A trial court should ordinarily resolve such dispute. This accords with the rule that a trial court should not dismiss a regular declaratory relief action when the plaintiff loses, but instead should issue a judgment setting forth the declaration of rights and thus ending the controversy. As stated in a case involving Western's predecessors, 'The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.'
> (*Id.* at 305 (Citations omitted).)

The Judgment of the trial court awards Santa Maria and Golden State prescriptive rights against the basin as a whole. However, the Judgment fails, because of a lack of proof by Golden State and Santa Maria, to declare the amount of the prescription against Appellants. Appellants, and each of them, have no way to know the amount of the prescriptive right against their groundwater pumping rights and to plan their

farming operations accordingly. Likewise, a potential purchaser of Appellants' property, and each of them, would have no way to evaluate the extent of any impairment of the groundwater right appurtenant to the property.

Accordingly, the Judgment is not final and there is a cloud on the title of all Appellants' properties.

(O) The Trial Court Erred In Failing In The Judgment To Specifically Describe The Prescriptive Encumbrance Burdening Appellants' Property.

Assuming arguendo that quantification of the prescriptive loss could be deferred to a later time, Appellants are entitled to a Judgment now that makes clear the nature of the prescriptive right that Santa Maria and Golden State acquired. The trial court described the nature of the right in detail as follows in the Phase 5 Statement of Decision:

> Those [prescriptive] rights are usufructuary and are **correlative to the same extent that an overlying owner's rights** are correlative. The Public Water Producers who established prescriptive rights are entitled to those specific quantities of water in the Basin, the same as any overlying landowner, so long as there is sufficient water in the aquifer. They **also have a priority over other appropriators** in those circumstances, **just as an overlying owner has a priority over appropriators when there is no surplus.**
> (Phase 5 Decision, C.T.-1,Vol.28,pg.7138:15-20.)(Emphasis added.)

The trial court correctly characterized the prescriptive right in terms of priority in the Phase 5 Decision. However, the trial court failed to include this critical description in the Judgment. In order to avoid a cloud on title, the Phase 5 Statement of Decision description of the encumbrance must be included in the Judgment.

(P) The Trial Court Erred In Failing In The Judgment To Specifically Describe How The Scope Of The Prescriptive

Encumbrance Will Be Determined In The Future And The Burden Of Proof Which Will Apply.

Assuming, arguendo, that the trial court can properly determine the magnitude of the prescriptive right in the future, the Judgment must declare that the party claiming prescription has the burden of proof by clear and convincing evidence based upon the common law standard.

The judgment also must make clear that future proof of the magnitude of the prescriptive loss must be determined based upon the period when prescription was proved. To accomplish this, the Judgment must clearly identify the five-year period when the prescriptive right was proved and use pumping data from that time period.

THE TRIAL COURT ERRED IN FAILING TO DECLARE IN THE JUDGMENT THAT THE DISMISSAL OF APPELLANTS' 2ND THROUGH 6TH CAUSES OF ACTION WERE WITHOUT PREJUDICE

Prior to the commencement of the Phase 4 trial, Appellants requested that the trial court dismiss without prejudice Appellants' 3rd through 6th causes of action. (R.T.-1,Vol.38,pg.7155:5-14)

The Purveyor Parties acknowledged that Appellants' motion to dismiss was without prejudice. (R.T.-1,Vol.38,pg.7155:15-17)

The trial court made clear that the dismissal was without prejudice but could be reasserted in the underlying action only with leave of the court. (R.T.-1,Vol.38,pg.7155:20-24)

However, the Judgment After Trial, the original form of which was drafted by the Purveyor Parties, improperly fails to recite that the dismissal of such causes of action were without prejudice. The Judgment merely states that the causes of action were 'dismissed.' (C.T.-3,Vol.3,pg.742:19)

Appellants request this Court order modification of the Judgment accordingly.

THE TRIAL COURT ERRED IN RULING ON THE PURVEYOR PARTIES' DECLARATORY RELIEF ACTION

(A) The Purveyor Parties Requested Adjudication Of All Groundwater Rights.

The Purveyor Parties declaratory relief causes of action requested a determination of the rights of all parties to water in the Santa Maria groundwater basin. These causes of action alleged that the water basin was in overdraft, requested a declaration of the ground water rights priorities of all parties and requested a physical solution to remedy overdraft conditions.

See Purveyor Parties' Cross-Complaints: Santa Maria (C.T.-1,Vol.27,pg.7001)Golden State (C.T.-1,Vol.1,pg.236) Rural Water (C.T.-1,Vol.3,pg.662) Pismo, Arroyo Grande, Grover Beach, Oceano (C.T.-1,Vol.3,pg.682) Nipomo (C.T.-1,Vol.2,pg.268)

(B) The Trial Court Erred In Failing To Determine Groundwater Rights Of All Parties Consistent With California Law.

(1) The Trial Court Erred In Failing To Declare That No Party Proved Pueblo Rights.

The pueblo right is recognized under California law. No party proved a pueblo right. Because the Purveyor Parties sought a declaration of all rights in the supply, to be complete for continuing jurisdiction and finality, the Judgment must reflect that none of the parties proved a pueblo right.

(2) The Trial Court Erred In Failing To Declare Overlying Rights.

The Purveyor Parties filed declaratory relief claims requesting a declaration of all water rights including their own. The Purveyor Parties

proved no ownership of property, and accordingly no overlying groundwater rights. The Judgment must reflect that the Purveyor Parties failed to prove any overlying rights.

Likewise, the trial court erred in failing to declare the priority of Appellants' overlying rights. As discussed above in the Quiet Title section, Purveyor Parties contended, and the court agreed, that fee ownership of these properties included the appurtenant right to pump groundwater and use this groundwater on these properties. The overlying right is a property right and the law is clear that where property is involved, the court must resolve the issue regardless of who is plaintiff and who is defendant and regardless of whether the determination is resolved by declaratory relief or by quiet title. *Western Aggregates, Inc. v. County of Yuba, supra,* at 305.

The court advised that even if it found quiet title relief was not appropriate, it would declare Appellants' groundwater rights based upon the declaratory relief causes of action filed by the Purveyor Parties. (R.T.-1,Vol.36,pg.6984:21-6985:1) The trial court failed to do so.

Failing to declare Appellants' overlying groundwater rights in the Judgment, resulted in extreme prejudice to Appellant's, by denying them their statutory right to quiet title.

(3) The Trial Court Erred In Awarding Prescriptive Rights.

(i) Both the Appellants and the Purveyor Parties requested adjudication of claimed prescriptive rights.

Both Appellants' and the Purveyor Parties' pleadings requested adjudication of alleged prescription claims. Unlike many water basin adjudications, the litigating parties in the underlying action did not stipulate to any of the elements of a prescription claim. In both *San Fernando* and the *Pasadena*, all parties stipulated to the elements of prescription.

The *Pasadena* litigants, including the party who appealed, stipulated as follows:

> ...all of the water taken by each of the parties to this stipulation and agreement, at the time it was taken, was taken openly, notoriously and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining herein.
> (*Id.* at 922.)

In the *San Fernando* litigation all parties stipulated as follows:

> The taking and diversion of waters from [the ULARA], and the beneficial use of said waters, by each of the parties hereto, at the time of the filing by plaintiff of its complaint herein, and for a period in excess of five years prior thereto, was open, notorious, and under a claim of right.'
> (*Id.* at 282)

Because no such stipulation was made in underlying action, the prescriptive claimants had the burden, by clear and convincing evidence, to prove all required elements of their alleged prescription claims.

(ii) The trial court erred in failing to bar the Purveyor Parties' prescription claims based upon equitable doctrines.

(a) *The Purveyor Parties' Prescription Claims Should Be Barred By The Doctrine Of Laches Due To Substantial Delay In Bringing The Claims And Substantial Resulting Prejudice To Appellants.*

The equitable doctrine of laches may bar a claim when the following circumstances are present: (1) an omission to assert a right; (2) a delay in the assertion of the right for some appreciable period; and (3) circumstances which would cause prejudice to an adverse party if assertion of the right is permitted. *Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 296.

(A1) *The Purveyor Parties delayed 30 years in asserting their claims.*

The trial court found that prescription operated in one of three possible time periods—1944-51, 1953-57 or 1959-67. (Phase 4 Decision, C.T.-1,Vol.28,pg.7157:19-22)

This action commenced in 1997. The Purveyor Parties could have requested confirmation of alleged prescriptive rights 30-40 years prior to the filing of the present action. Appellants argued in the trial court that the equitable doctrine of laches should bar Purveyor Parties' prescription claims based upon a delay of 30 or more years.

(A2) ***The trial court recognized the inherent prejudice caused by the Purveyor Parties asserting prescription claims 30-40 years after the prescriptive conduct was alleged to have occurred.***

The Purveyor Parties contended, and the trial court agreed, that to defend their overlying groundwater rights Appellants were required to prove their own pumping during prescriptive periods that occurred 30 and 40 years ago. The trial court recognized that this evidence in opposition to a prescription claim would be difficult to garner and present more than thirty years after the alleged prescriptive conduct occurred. (R.T.-2,Vol.1,pg.71:2-21)

(b) ***The Purveyor Parties' Prescription Claims Should Be Barred By The Doctrine Of Unclean Hands And Sovereign Wrongdoing.***

Fundamental elements of proof of a prescriptive claim are that the conduct giving rise to prescription was intentional, open, notorious, hostile and adverse to the rights of the party against whom the prescriptive right is asserted. *Unger v. Mooney* (1883) 63 Cal. 586, 595 It is axiomatic that, unlike a private party, a public entity must provide for the general health

and welfare of its citizens and may not engage in unlawful or trespassory action against its citizens necessary to perfect a prescriptive claim

(iii) The trial court erred in failing to deny the Purveyor Parties prescriptive claims because prescription requires conduct prohibited by the *California Constitution*.

A prescription claim cannot, as a matter of law, be perfected unless the groundwater basin is in overdraft when the prescriptive use occurs. Overdraft requires that further extractions would threaten to "destroy or endanger" the water basin, *Pasadena, supra,* at 929 and which would have "adverse effects on the basin's long term supply." *San Fernando, supra,* at 277-278. Accordingly, the issue logically arises whether a governmental entity may intentionally pump water in an overdrafted basin knowing that such pumping will destroy or endanger the basin and then be rewarded by our courts by conferring a valuable right under our common law.

Additionally, The *California Constitution* requires all water use in California be 'reasonable' and that 'the conservation of such waters be exercised ..... in the interest of the people and for the public welfare.' *California Constitution, Article X, Section 2.* Pumping that creates or enlarges an overdraft by its nature endangers the supply and cannot possibly be reasonable or constitutional.

One of the Purveyor Parties, Golden State, plainly recognized that delaying legal action to confirm a prescriptive claim would increase the amount of the prescriptive claim. In testimony to the Public Utilities Commission, Golden State announced that delaying litigation would have the beneficial effect of enlarging Golden State's prescriptive right. (C.T.-4,Vol.4,pg.927-928) Golden State elected to delay even though it believed the supply to be in overdraft and in danger of harm due to overdraft. (C.T.-4,Vol.4,pg.914) Such conduct is patently unconstitutional, against the

public interest and should not be countenanced by this Court. Compounding this unconstitutional conduct is the fact that the Purveyor Party entities claiming prescription are insulated from prescription. *Civil Code* §1007. It would be inherently unfair for the government to wrongfully take water from its citizens under circumstances where the citizens have no such right against the entity.

Prescription requires proof of use with no legal right to do so. Such conduct unconstitutionally violates the rights of all citizens, including Appellants herein.

In summary, the Purveyor Parties could not perfect a prescription claim in the absence of unconstitutional pumping. Unconstitutional pumping cannot be the basis of a prescription claim.

(iv) The trial court erred in failing to bar the Purveyor Parties' prescription claims because they were not timely filed.

(a) *The Purveyor Parties' Claims Were Barred By Code Of Civil Procedure §315 Because They Were Not Filed Within Ten Years Of The Accrual Of The Claims.*

Code of Civil Procedure §315, which sets forth a ten-year statute of limitation on a governmental entity's claim against citizens which affects rights in real property, provides:

> WHEN THE PEOPLE WILL NOT SUE. The people of this **State will not sue any person for or in respect to any real property**, or the issues or profits thereof, by reason of the right or title of the people to the same, **unless**:
>
> Such **right or title shall have accrued within ten years before any action or other proceeding for the same is commenced;** or, The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

Local public agencies and or utilities, such as the Purveyor Parties, are bound by the requirements of *Code of Civil Procedure* §315. *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 872-873. Accordingly, the Purveyor Parties were barred from suing Appellants unless their prescription claim accrued within ten years before the action was filed.

(b) *The Purveyor Parties' Prescription Claims Accrued At The Latest In 1967 And Any Claim Thereon Must Have Been Made By 1977.*

The trial court identified three prescriptive periods, the latest of which ended in 1967. (Phase 4 Decision, C.T.-1,Vol.28,pg.7157:19-22) Accordingly, the prescriptive right accrued no later than 1967. In order to timely assert a claim in conformance with *Code of Civil Procedure* §315, the Purveyor Parties would have been required to file an action no later than 1977. The Purveyor Parties did not file claims until 1998, over twenty years too late.

(v) The trial court erred in failing to find that the Purveyor Parties' prescriptive rights were lost by non-use.

(a) *Prescriptive Rights Are Lost By Non-Use.*

Prescriptive easements are subject to loss by nonuse pursuant to *Civil Code* §811. *Civil Code* §811(4) reads:

> **A servitude is extinguished** when the servitude was acquired by enjoyment, **by disuse** thereof by the owner of the servitude **for the period prescribed for acquiring title by enjoyment.** (Emphasis added.)

Cases litigating prescription of surface water characterize the right as an easement and confirm that *Civil Code* §811(4) bars prescriptive claims lost by non use stating:

..... there was evidence of use for a period of five years, continued in such a manner as to create a prescriptive title. ..... Such a right constituted a servitude upon the original title of Asbury, and the nonuse thereof would not extinguish it unless the nonuse continued for the period of five years.
(*Northern California Power Co. v. Flood* (1921) 186 Cal. 301, 305-306.)

..... the evidence just referred to would show that she subsequently had lost it by disuse. An easement acquired by enjoyment is lost by a disuse thereof for the period of five years. (*Civil Code* §811(d).....
Garbarino v. Noce (1919) 181 Cal. 125, 130.)

(b) ***The Purveyor Parties Made No Use Of Any Alleged Prescriptive Rights After 1967 When Overdraft Last Was Alleged And Accordingly Any Such Rights Were Lost By Non-Use.***

The trial court determined that prescriptive rights attached in 1967 at the latest. To avoid loss by non-use, Santa Maria and Golden State must have exercised a prescriptive priority to those rights prior to 1973, five years after overdraft was last alleged to have occurred.

(vi) The trial court erred in finding prescription absent proof of substantial infringement of Appellants' water rights and damage to property.

(a) ***The Prescriptive Period Does Not Begin To Run Until Substantial Infringement Occurs.***

In the context of groundwater, prescription is based upon a statute of limitations that begins to run when an injunction becomes available to the party having the superior groundwater right. It is well settled in California water cases, that a water user with priority water rights is not entitled to an injunction until there is *substantial* infringement to the water right of the priority user. Technical violations where only nominal damages would be

available will not provide a legal basis for injunctive relief and therefore will not cause the statute of limitations to begin to run.

> Superior rights holders are entitled to the protection of the courts against any ***substantial infringement*** of their rights in water which they reasonably and beneficially need. (*Pasadena,, supra,* at 926. (Emphasis added.))
>
> ..... the ***technical infringement*** of the right is not actionable ..... This is but another way of saying that the appropriator may use the stream surface or underground or percolating water, so long as the land having the paramount right is ***not materially damaged***. (*Peabody v. City of Vallejo, supra,* 2 Cal.2d 351. 374-375. (Citations omitted.) (Emphasis added.))

(See also *Davies v. Krasna* (1975) 14 Cal.3d 502, 513: *Lowe v. Copeland* (1932) 125 Cal.App. 315, 323; *W. Hutchins, The California Law of Water Rights* (1956) pg. 500.)

(b) *The Purveyor Parties Presented No Evidence Of Infringement Of Appellants' Water Rights Or Damage To Appellants' Properties.*

No evidence was offered, and no expert testified, that Appellants water use was restricted or the property harmed, substantially or otherwise, at any time or that deficits would ever result in such infringement. Further the court made no finding of any infringement or damage to Appellant's water use or property.

To the contrary, the unrebutted testimony of Appellants' expert Tony Daus, was that at all relevant times, water was available for use as necessary on Appellants' parcels and that there were no deleterious effects on the basin from such pumping. (R.T.-1,Vol.43,pg.7953:8-20) Mr. Daus further testified that the aquifer recovered. (R.T.-1,Vol.43,pg.7955:7-19) The court found that no permanent damage occurred and that during times of shortage, water users continued to pump. (Phase 4 Decision, C.T.-

1,Vol.28,pg.7162:2-6; Phase 5 Decision, C.T.-1,Vol.28,pg.7137:13-16; R.T.-1,Vol.43,pg.7957:15-20)

The trial court characterized the net effect of Santa Maria and Golden State prescriptive pumping as against Appellants' properties, as *de minimus.*

> ..... [litigating parties] will only be proportionately affected in proportion to the whole- an amount **presumably almost small enough to be *de minimus*** given the size of the valley and annual pumping of water within the valley.
> (Phase 5 Decision, C.T.-1,Vol.28,pg.7139:13-16)

Accordingly, there was no substantial evidence presented that Appellants water rights were substantially infringed or that the groundwater supply was ever damaged and the trial court made no such finding. Accordingly, the statute of limitations did not begin to run since Appellants had no legal right to stop the Purveyor Parties conduct.

(vii) Proof of overdraft is a prerequisite to a claim of prescription.

It long has been held that a finding of overdraft is a necessary prerequisite to prove a claim of prescription. (*San Fernando, supra,* at 277-278 and *Pasadena, supra,* at 926) Absent overdraft, an overlying landowner has no basis to enjoin pumping against a water user with a lower priority. *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 439.

The California Supreme Court in *San Fernando*, citing other appropriate California groundwater cases, defines surplus, overdraft and the time when a landowner has a right to an injunction as follows:

> A ground water basin is in a state of surplus when the amount of water being extracted from it is less than the maximum that could be withdrawn without adverse effects on the basins' long term supply. While this state of surplus exists, none of the extractions from the basin for beneficial use, constitutes such an invasion of any water right as will entitle the owner of the right to injunctive, as distinct from declaratory, relief.

> (citing *Pasadena*) Overdraft commences whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends. Thus on the commencement of overdraft there is no surplus available for the acquisition or enlargement of appropriative rights. Instead, appropriations of water in excess of surplus then invade senior basin rights, creating the elements of adversity against those rights prerequisite to their owners' becoming entitled to an injunction and thus to the running of any prescriptive period against them. (citing *Pasadena)* (*Id.* at 277–278.)

Overdraft commences when water use exceeds the safe yield but only if the basin has been drawn down sufficiently to maximize yield. Accordingly, a finding of overdraft also requires the exhaustion of temporary surplus. (See discussion of this topic at *San Fernando, supra,* at 280 and the discussion below of the 'temporary surplus' concept.)

(viii) The trial court found no prescription in the phase 3 trial based upon the proper standard of overdraft but erred in the phase 4 trial by adopting an incorrect definition of overdraft and on that basis improperly found prescription.

(a) *The Trial Court Applied The Correct Legal Standard In The Phase 3 Trial.*

In the Phase 3 trial, appellants and Purveyor Parties litigated the issue of overdraft. The trial court applied the correct standard of overdraft relying on *San Fernando* and other controlling cases. The trial court in Phase 3 defined "overdraft" as follows:

> The law defines "overdraft" as extractions in excess of the safe yield of water from the aquifer, which over time will lead to a depletion of the water supply within a groundwater basin as manifested by **permanent lowering** of the water table. City of Los Angeles v. City of San Fernando (1975) 14 Cal. 3d 199, City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d at p. 929, Orange County Water District v. City of

> Riverside (1959) 173 Cal. App. 2d 137. Safe yield is the amount of annual extractions of water from the Basin equal to the amount of water needed to recharge the groundwater Basin and maintain it in equilibrium, plus any temporary surplus. Temporary surplus is defined as that amount of water pumped from an aquifer to make room underground to store future water that would otherwise run off into the ocean or otherwise be wasted. Safe yield cannot be determined by looking at the groundwater Basin in a single year but must be determined by evaluating the Basin conditions over a sufficient period of time to determine whether pumping rates will lead to eventual permanent depletion of the water supply. Recharge must equal discharge over the long term. City of Los Angeles v. City of San Fernando, supra, 14 Cal. 3rd at 278-279. (C.T.-1,Vol.17,pg.4412:10-23) (Emphasis added.)

The *San Fernando* overdraft definition recognizes that in order to maximize water withdrawal from the groundwater basin, overdraft does not commence until the '**maximum**' quantity of water has been removed which can be removed without adverse affects on the basin's long term supply. This is consistent with Article X, Section 2 of our *California Constitution* that requires maximum use of groundwater. Accordingly, overdraft correctly defined, recognizes that the supply must be used to the maximum possible amount.

Based upon this proper definition of overdraft, the trial court properly found at the end of Phase 3, that there was not then, nor had there ever been, an overdraft of the Santa Maria Basin. As the court stated:

> For the reasons detailed below, Appropriators have not established by any standard of proof either the Basin's safe yield or that long-term extractions from the Basin have exceeded any such safe yield so as to manifest overdraft conditions.
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4414:23-25)

> The court is persuaded that evidence of such undesirable results, or in this case the entire absence of such undesirable results, along with credible evidence of stable or surplus

> conditions, is sufficient to establish that the Basin is not in overdraft.
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4415:3-5)
>
> Moreover, as discussed below, even if it were necessary to quantify safe yield in order to determine the issues presented for trial in this phase of the case, the Appropriators failed to meet their burden of proof on this issue with credible evidence.
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4416:14-16)
>
> Landowners presented credible evidence of a water budget confirmed by an independent change in storage calculation. This budget showed a modest surplus in supply over a reasonable base period, and was further supported by a peer review.
> (C.T.-1,Vol.17,pg.4416:17-19)
>
> **The court is not persuaded by clear and convincing evidence that the Basin historically was or is in overdraft. If the court were to apply a lesser standard of proof by a preponderance of the evidence, the decision would be the same.** (Phase 3 Decision, C.T.-1,Vol.17,pg.4420:26-28)
>
> **The court is persuaded by a preponderance of the evidence presented by Landowners that, based on all sources of ground water recharge, the Basin is not presently in a state of overdraft, nor has it been historically**.
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:2-4)
>
> The court therefore concludes based on all the evidence that the Basin is not, and has not been, in overdraft.
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:25-26)

The trial court made clear that the definition applied in Phase 3 was the correct definition to apply to claims of prescription of groundwater and that the 'no overdraft' finding of Phase 3 disposed of the prescriptive claims of the Purveyor Parties.

> **This conclusion disposes of the Appropriators' prescriptive-right claims based on a condition of overdraft.**
> (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:26-27) (Emphasis added.)

(b) ***The Trial Court Applied An Incorrect Legal Standard For Overdraft In The Phase 4 Trial.***

In the Phase 4 trial, the parties litigated Appellants Quiet Title action and the Purveyor Parties declaratory relief claims. In the Phase 4 Statement of Decision, over objection of Appellants, the trial court again considered the Purveyor Parties' claim of overdraft based upon a new and different overdraft standard defined as follows:

> ..... if overdraft is defined as extractions exceeding recharge such that there is serious depletion of the water supply, as defined in *City of Barstow v. Mojave Water Agency, supra*, 23 Cal.4th 1224, that may set in motion the prescriptive process because it creates the danger of permanent lowering and exhaustion of the supply.
> (Phase 4 Decision, C.T.-1,Vol.28,pg.7153:26-7154:2)

The definition of overdraft adopted by the trial court in Phase 4 is incorrect as a matter of law.

(A1) ***Reliance on the Mojave definition is misplaced.***

As discussed previously, determination of the commencement of overdraft is critical to a determination of the beginning of the prescriptive period and to evaluate whether a physical solution is appropriate. The Supreme Court in *San Fernando* defined the commencement of overdraft at great length. To the contrary, *Mojave* did not analyze the definition of the commencement of overdraft in any manner. The legal question in *Mojave* was whether the trial court could definitively resolve water right priorities in an overdrafted basin with a "physical solution" that relies on the

equitable apportionment doctrine but does not consider the affected owners' legal water rights in the basin. *Id*, at 1233.

The only discussion of facts related to the overdrafted basin in *Mojave*, occurs in the last three sentences of the Background section where the Court states:

> The **largest increase** in overdraft in the basin occurred between 1970 and 1980. **During that time**, well levels and water quality experienced a steady and significant decline. **If overdraft conditions continue**, the basin's water supply will experience significant depletion.
> (*Id*, at 1234) (Emphasis added.).

It is clear that this factual discussion is not intended as an analysis of the commencement of overdraft within the meaning of *San Fernando*. The language above is merely a factual discussion regarding a period of greater decline **after** overdraft already had commenced and speculation as to what might happen in the future. Commencement of overdraft is not discussed, nor is *San Fernando* discussed. The decision contains no legal discussion whatsoever regarding the legal definition of overdraft nor regarding what facts will give rise to the commencement of overdraft.

(A2) *The definition of overdraft adopted by the trial court fails to require exhaustion of temporary surplus.*

The definition of overdraft adopted by the trial court cannot constitutionally be a proper definition of overdraft because it does not include the requirement that the 'temporary surplus' be exhausted.

The *San Fernando* decision introduced the concept of 'temporary surplus.' By 1975, hydrologists had long recognized that in order to produce maximum yield, water levels must be lowered in order to create room to accommodate all available recharge in years of plentiful rainfall. In *San Fernando*, the plaintiff argued that the prescriptive period could not

commence until this 'temporary surplus' had been drawn down so that the basin could function optimally.

> ..... plaintiff contends that when the safe yield was first exceeded by extractions, there was a temporary surplus, and that overdraft did not commence (or any prescriptive period become operative) until that temporary surplus ended. The temporary surplus, it is asserted, was the amount of water whose extraction from the basin would prevent waste in subsequent wet years by providing underground storage space in which rainfall in excess of the annual average could be stored for future use. **It is not until this storage space has been provided and temporary surplus ended that plaintiff considers it proper to measure overdraft by safe yield.**
> *(Id.* at 215)(Emphasis added)

The Court agreed. Recognizing that failure to exhaust the temporary surplus would result in a waste of water, the *San Fernando* court made clear that temporary surplus must also be exhausted in order to establish the onset of overdraft. *Id.* at 280-281. Because our *California Constitution* prohibits waste and compels maximum use of water resources, exhaustion of the temporary surplus is a constitutionally required predicate to any injunction to cut water use.

The definition of overdraft relied upon by the trial court in Phase 4 above, based upon *Mojave* dictum, fails to require exhaustion of the temporary surplus. As such, the definition is unconstitutional.

The trial court concluded that there was 'no surplus, temporary or otherwise.' (Phase 4 Decision, C.T.-1,Vol.28,pg.7154:23-27)
However, there was no substantial evidence to support this finding. In Phase 3, the concept was explained by one of the testifying experts. (R.T.-1,Vol.15,pg.4038:2-4043:4) However, no expert testified to exhaustion of temporary surplus nor did any expert testify that the basin was operating at a level that would maximize the basin yield.

(c) *There Was No Evidence Of Overdraft Presented In Phase 4 Or Phase 5 And The Phase 3 Expert Testimony Found Credible By The Court Confirmed There Was No Overdraft.*

In the Phase 3 trial, expert Joseph Scalmanini testified that the basin had never been in overdraft. (R.T.-1,Vol.17,pg.4428:1-20) Although expert Terry Foreman attempted to give testimony in the Phase 3 trial that the basin had been in overdraft, his testimony was found not credible by the trial court and disregarded. (Phase 3 Decision, C.T.-1,Vol.17,pg.4422:9-10)

The only expert hydrologist who testified in Phase 4 was expert Dennis Williams. Expert Williams, who testified for the Purveyor Parties, did not testify that the basin was in overdraft, nor was any other expert testimony presented in Phase 4 that the basin was in overdraft. (See generally, R.T.-1,Vol.39,pg.7356-7398)

Nor did expert Williams testify to safe yield. Instead, he testified to '**native yield**.' (R.T.-1,Vol.39,pg.7380:13-23) *San Fernando* makes clear that a finding of overdraft requires a finding of safe yield and a comparison of safe yield to demand on a long term basis. *Id.* at 280.

Instead of following the *San Fernando* approach, the trial court used an improper definition of overdraft, mixed and matched figures from one expert's report to another expert's report, did mathematical calculations and concluded, contrary to the Phase 3 determination, that overdraft existed. The trial court used expert Williams' '**native yield**' figure of 60,000 afy (Phase 4 Decision, C.T.-1,Vol.28,pg.7156:16-18) which was not adjusted for ocean outflow. The trial court then considered two ocean outflow estimates, one by expert Scalmanini and another by expert Foreman, both from Phase 3. The trial court chose to adjust the 'native yield' for ocean outflow using numbers by the expert Foreman. (Phase 4 Decision, C.T.-

1,Vol.28,pg.7156:21-27) The trial court then applied demand numbers by expert Scalmanini and/or by expert Foreman. (Phase 4 Decision, C.T.-1,Vol.28,pg.7156:27-7157:4)

No expert testimony supported the idea that these disparate figures could be validly netted against each other. No expert testified that the correctly comparable time periods were used. Moreover, the legal analysis is flawed since to determine overdraft, a determination of safe yield first must be made. No expert ever testified to "safe yield" and the trial court clearly had no competent evidence of safe yield from any source. Finally, as discussed above, expert Williams testified that his 60,000 afy number was **not safe yield, but rather, native yield** which is a different concept, as discussed in *Pasadena* and *San Fernando*. (R.T.-1,Vol.39,pg.7380:13-23)

Appellants objected to this methodology arguing that mixing and matching expert figures by the court was not appropriate and would require the trial court to be an expert hydrologist evaluating data and then giving testimony in the same trial he was adjudicating. The trial Judge was not an expert hydrologist and such analysis and testimony by him would be inappropriate in any event. Doing so bypasses the need to have expert testimony on this critical hydrogeologic issue. (C.T.-7,Vol.13,pg.3431:21-28; C.T.-7,Vol.13,pg.3432:2-4)

A finding of overdraft requires expert testimony based upon the *Pasadena* and San *Fernando* standard which requires expert testimony showing much more than simply a comparison of supply versus demand pumping deficit. Expert determination of safe yield and exhaustion of temporary surplus is required to prove overdraft. This testimony was not introduced.

Finally, the Purveyor Parties failed to present any evidence of exhaustion of temporary surplus. Accordingly, there was no substantial

evidence to support a finding of the safe yield or that temporary surplus was exhausted.

(ix) The trial court erred in awarding Santa Maria and Golden State prescriptive rights because there were surplus years during the 1959-1967 period upon which the trial court based its finding of overdraft.

(a) *Any Year Of Annual Surplus Interrupts The Running Of The Prescriptive Period.*

As discussed above, overdraft is defined by 'safe yield' which is a long-run concept. In addition, there can be no overdraft, and hence no prescription, when there is an annual surplus during any claimed period of prescription.

This rule has long been applied in surface water cases. As the court noted in *Armstrong v. Payne* (1922) 188 Cal. 585:

> A single interruption once every five years, under such circumstances as to challenge the right of the adverse claimant, will prevent the acquisition of a title by prescription, for there would then be no period of continuous use for five years.
> (*Id.*, at 596.)

The *San Fernando* court made clear that this rule also applies to groundwater explaining:

> ..... since adverse taking is impossible during surplus years their occurrence breaks the continuity required for the running of a prescriptive period.
> (*Id.* at 284.)

(b) *Years Of Annual Surplus Occurred During 1959-1967*

The trial court identified three prescriptive periods: 1944-1951, 1953-1957 and 1959-1967. (Phase 4 Decision, C.T.-1,Vol.28,pg.7157:21-22) As discussed below, uncontradicted credible evidence proved that

actual annual surplus conditions existed in 1962 and in 1967 thus breaking the continuity of the third of the three possible prescriptive periods identified by the court.

In Phase 3, two experts offered testimony on historical annual supply and demand conditions. Expert Scalmanini testified to annual numbers in the Phase 3 Trial. (Phase 3, Exhibit 1-55) The right hand column shows annual change in storage which is the annual supply minus annual demand. (R.T.-1,Vol.17,pg.4421:8-20) These exhibits confirm that both 1962 and 1967 were surplus years. Expert Foreman was found not to be credible regarding his ultimate conclusions. However, his testimony also confirmed surplus conditions in 1962 and 1967. (See, "Annual Water Balance" in the fourth column from the right (which is the annual supply minus annual demand); Phase 3, Exhibit A-130)

The testimony of expert Williams offered by Purveyor Parties in Phase 4, did not contradict the expert testimony of surplus in 1962 and 1967. Expert Williams offered testimony entirely as to conditions prior to 1962. (R.T.-1,Vol.39,pg.7359:12-19; R.T.-1,Vol.39,pg.7362:18-23; R.T.-1,Vol.39,pg.7363:7-10) Expert Williams did not testify as to any yearly numbers, only an average number for the years 1919 to 1959. (Phase 4, Exhibit F-10)

Because 1962 and 1967 were surplus years, these years break the continuity of adversity necessary to establish prescription in the 1959-1967 time period.

Santa Maria introduced no evidence of any pumping in either the 1945-57 or in the 1953-57 time frames. (Phase 4, Exhibit MM; Phase 4, Exhibit NN) Accordingly, since no evidence shows any pumping during these periods it could not claim prescriptive rights based upon these time frames. Santa Maria **did** introduce pumping evidence for the 1959-67 period but because of the occurrence of annual surplus in 1962 and 1967,

Santa Maria could not have perfected prescriptive rights during this time frame. Accordingly, the undisputed evidence confirms that Santa Maria could not prescript because it did not prove pumping of any groundwater during the first two prescriptive periods and because of annual surplus in the third period.

If **Golden State** could prescript, it could only occur during the earlier period and not for the 1959-67 period that the court used because 1962 and 1967 were surplus years. (Phase 4, Exhibit F-17; Phase 4, Exhibit F-18) Finally, Golden State could not, as discussed below, perfect any prescriptive claims during the two earlier periods because it did not prove that it pumped groundwater during these earlier periods.

(x) The trial court erred in awarding prescriptive rights to Golden State Water Company because Golden State failed to produce any evidence that Golden State pumped any groundwater.

Pumping during the alleged prescriptive period is a foundational requirement to prove a prescriptive claim to groundwater. *San Fernando, supra,* at 278. Golden State Water Company failed to produce any evidence that Golden State pumped any groundwater. Unlike the City of Santa Maria which produced pumping records going back to 1957-58, Golden State produced no pumping records and failed to prove that it engaged in any pumping whatsoever. Instead, Golden State engaged a hydrologist to opine as to generalized historic pumping within a geographic area that later was included within the service area of Golden State. An estimate of pumping was offered. (Phase 4, Exhibit F-17; Phase 4, Exhibit F-18) The hydrologist, expert Foreman, clearly testified that Exhibit F-17 did not show pumping by Golden State. Instead, he testified that the exhibit only showed prior pumping in part of the geographic area which later was

included within Golden State's **service area**. (R.T.-1,Vol.39,pg.7404:27-7405:7)

Expert Foreman testified as follows:

> [Exhibit F-17] shows the historical production for Golden State water Company's **service areas** in the Santa Maria Valley portion of the Santa Maria valley groundwater basin……
> (R.T.-1,Vol.39,pg.7412:9-12)

Counsel for Golden State attempted to elicit speculative testimony from expert Foreman that the pumping reflected in Exhibit F-17 was that of Golden State or its predecessors:

> Q …… IF I UNDERSTOOD YOUR TESTIMONY, THERE WAS PRODUCTION HISTORY FOR GOLDEN STATE AT LEAST IN THE ORCUTT AREA **OR ITS PREDECESSOR IN INTEREST** AS EARLY AS THE 1900, 1910 VINTAGE?
> (R.T.-1,Vol.39,pg.7414:9-12)

The witness made clear that the production figures were for the **area** and that he, the witness, presumed that this pumping was done by the **predecessors** of Golden State, also known as Southern California Water Company. Expert Foreman testified as follows:

> Mr. Foreman: THERE WAS DOMESTIC AND MUNICIPAL PRODUCTION IN THAT AREA SO **PRESUMABLY IT WAS PART OF THE PREDECESSORS** TO SOUTHERN CALIFORNIA WATER COMPANY, YES.
> (R.T.-1,Vol.39,pg.7414:13-15)

On objection, the trial court correctly excluded this speculative testimony which suggested that prior pumping had been that of Golden State's predecessors in interest. (R.T.-1,Vol.39,pg.7414:16-18)

Golden State produced no evidence to support any legal basis for Golden State to claim a water right based upon pumping by some other person or entity. There was no testimony proving that Golden State itself pumped any groundwater. In the absence of pumping groundwater, Golden State had no basis whatsoever to prove a prescriptive groundwater right.

(xi) The trial court erred in awarding prescriptive rights because the Purveyor Parties failed to prove that their water use was without legal right.

A party claiming prescriptive rights must prove that, during the prescriptive period, the prescriptive claimant's use was without any legal right. *Lee v. Pacific Gas & Elec. Co.* (1936) 7 Cal.2d 114, 120. In other words, the prescriptive claim must affirmatively prove the claimant's own wrongful conduct. Such proof is necessary because absent wrongful conduct, the party against whom the right is sought has no legal basis to stop such conduct. In the absence of the legal right to stop such conduct, the prescriptive period will not begin to run and no prescriptive claim can be perfected.

In analyzing this issue, the trial court applied an incorrect legal standard. The court opined that when overdraft occurs, all non-overlying pumping becomes adverse to all overlying pumpers stating:

> Undisputed Phase 3 and 4 evidence shows that years of overdraft, or "no surplus" existed from at least 1944-1951, 1953-1957, and 1959-1967, when Twitchell began to produce an augmentation to the water in the aquifer, and the Public Water Producers within the basin pumped regular quantifies of water from the aquifer, as follows: City of Santa Maria – 5,100 acre feet a year; Golden State – 1900 acre feet a year. (Phase 4 Decision, C.T.-1,Vol.28,pg.7161:6-11)

The trial court made no finding that either prescriptive claimants' individual pumping was unlawful. The trial court simply assumed that **all**

appropriative pumping in times of shortage was wrongful and gave rise to prescription. This conclusion was wrong as a matter of law as discussed below.

In order to determine whether pumping in a groundwater basin by a particular appropriator is lawful, or without right and wrongful, three pieces of information are indispensable and include: 1) the Safe Yield; 2) the total amount of pumping; and 3) the priority of each appropriator.

Appropriators may lawfully pump whatever amount of the safe yield is not used by overlying landowners or others with a priority right. It follows that as shortage develops in a basin, with pumping by both overlying owners and appropriators, there will initially be sufficient safe yield to satisfy the needs of all of the overliers and most of the appropriators. Only the most junior appropriators will be pumping unlawfully. Only when the water shortage deficit is so great that there is no surplus water available for appropriators, do all appropriators become unlawful pumpers. If there is any surplus, some appropriators will be lawfully pumping and could not be enjoined. Accordingly, such pumping would not be unlawful and would not support a prescription claim.

An example is instructive. Assume that the safe yield is 100,000 afy on a long term average. Also assume that total pumping is 105,000 afy on a long term average. Finally, assume that total overlying pumping is 85,000 afy on a long term average. The difference between the total overlying pumping and the safe yield leaves 15,000 afy available as surplus water for appropriation. However total appropriative pumping is 20,000 afy, 5,000 afy in excess of the safe yield. Accordingly, only 5,000 afy of the total appropriative pumping is wrongful, in excess of the safe yield.

Now assume that Appropriator A is pumping 10,000 afy and Appropriator B also is pumping 10,000 afy. Only one of these appropriators can be pumping the 5,000 af wrongfully, without legal right

to do so. To claim prescription based upon wrongful pumping, Appropriator A, for example, would need to prove that its appropriative rights were junior, perfected later, than the rights of Appropriator B.

In their respective pleadings, Purveyor Parties claimed they had appropriative rights that would allow them to lawfully pump groundwater in the basin. See SCWC's Cross-Complaint (C.T.-1,Vol.1,pg.243:4-5); See City of Santa Maria Cross-Complaint, Page 3, Paragraph 10 (C.T.-1,Vol.27,pg.7004) However, as a necessary basis to support a prescriptive claim, Purveyor Parties were required to prove precisely the contrary, that they had no appropriative rights during any alleged prescriptive period.

In summary, an appropriator seeking to claim prescription based upon wrongful pumping must prove 1) the Safe Yield; 2) total pumping; and 3) the priority rights of all pumpers to prove that the appropriative claimant's pumping was without right and wrongful. The Purveyor Parties failed completely to make this proof. Accordingly, they could not, and necessarily did not, prove that their pumping was wrongful during any of the prescriptive time frames.

Also, neither Santa Maria nor Golden State proved the nature of their pumping. Neither proved whether its pumping was appropriative, overlying or otherwise. The trial judge apparently assumed, without evidentiary basis, that all of such pumping was appropriative when it was probable that Santa Maria also used water on parks which would have been an overlying use. Overlying use would constitute lawful pumping which would not support a prescription claim.

Finally, case law uniformly holds that appropriative and prescriptive rights are established only by actually using water. In the context of groundwater, some fraction of the amount pumped returns to the groundwater body. Accordingly, the measure of the right is the amount actually consumed, not simply the amount of gross pumping. Water that is

lifted to the surface and then returns to the basin deprives no one of the supply and cannot therefore be the basis of a prescriptive right. Santa Maria and Golden State proved only pumping. They produced no evidence to prove the amount of water actually consumed which did not return to the basin as return flow.

(xii) The trial court erred in failing to require proof of notice based upon the correct legal standard.

(a) *Notice Of Specific Conditions Which Legally Constitute Overdraft Is Necessary To Prove Prescription.*

The California Supreme Court in *San Fernando* made clear that legally sufficient notice must be notice sufficient to place a landowner on notice of all information necessary to trigger an obligation on the part of the landowner to take action to protect the groundwater right as against the party making the prescriptive claim. As the Court noted:

> **Thus in the present case the trial court erred in basing an award of prescriptive rights on the running of a prescriptive period whose commencement coincided with the commencement of overdraft without making any determination of the time at which the owners of the rights being lost by such prescription were first chargeable with *notice of the overdraft.* The findings that the takings from the basin were open and notorious and were continuously asserted to be adverse does not establish that the owners were on *notice of adversity in fact caused by the actual commencement of overdraft.*** Nor have the parties called to our attention any evidence in the record from which the trial court could have fixed any time at which the owners of Sylmar basin rights should reasonably be deemed to have received notice of the commencement of overdraft in the basin.
> (*Id.* at 283.) (emphasis added)

(b) *The Trial Court Failed To Apply The Correct Standard Of Notice*

The trial court defined the notice standard as follows:

> The standard for notice in groundwater basins is **falling water levels** or other relevant evidence such that pumpers can reasonably be charged with notice that there is a **deficiency in the water supply**. (Pasadena, supra, at 930) Thus, constructive notice of **adverse conditions**, by which a party "should reasonably be deemed to have received notice of the commencement of overdraft" San Fernando, supra, at 283.
> (Phase 4 Decision, C.T.-1,Vol.28,pg.7158:7-12) (emphasis added)

The trial court improperly concluded that notice of "falling water levels", "deficiency in the water supply" or "adverse conditions" is sufficient to prove a prescription claim. A review of the Phase 4 Statement of Decision makes clear that the trial court found notice of falling water levels, deficiency of the supply or adverse conditions sufficient. (*Ibid.*) However, *San Fernando* requires proof of more than falling water levels or a deficiency in the supply to prove overdraft.

Farmers such as Appellants herein, are acutely aware that **falling water levels and deficiency of the supply occur naturally through wet and dry cycles**. It is only when the conditions articulated by *San Fernando* exist, including exhaustion of temporary surplus, that a landowner has a right to injunctive relief to prevent pumping in excess of safe yield, and only then when a landowner is charged with notice sufficient to begin the running of the prescriptive period.

(c) *Notice Of Overdraft Requires Notice Of The Identity Of The Party To Be Sued To Protect The Overlying Right.*

Notice of the specific conditions which legally constitute overdraft would be meaningless in the context of a prescription claim unless the party against whom the prescriptive right is being asserted, also has knowledge of

the identity of the adverse party who should be sued to protect the overlying right. California cases discussing the 'open and notorious' character of adverse use, frequently state that the intruder must 'fly his flag' to put the owner on notice that an unlawful invasion of rights has occurred, and on notice of the identity of the invader. *Wood v. Davidson* (1944) 62 Cal.App.2d 885, 890. The legal right to enjoin prescriptive actions cannot be exercised without knowing who to sue to stop the prescriptive conduct.

In the context of alleged prescription of a groundwater right, the party against whom the prescriptive right is claimed must have knowledge of the unlawful invasion of rights based upon the actions of the party claiming prescription. As the Court noted in *San Fernando*:

> The findings that the takings from the basin were open and notorious and were continuously asserted to be adverse does not establish that the owners were on *notice of adversity in fact caused by the actual commencement of overdraft.*
> (Id. at 243)

As noted *supra*, an appropriator may lawfully pump ground water even during a time of shortage depending upon the priority of the appropriator's first in time right and depending upon the amount of the supply. Accordingly, the party claiming prescription would need to prove that the party to be charged with notice, had notice that the prescriptive claimant did not possess any appropriative rights which would lawfully allow such pumping.

(xiii) There Was No Substantial Evidence To Prove Notice

(a) *Introduction.*

Appellants are not aware of any California groundwater case wherein all the required elements of notice were factually litigated. Reported cases generally involve party stipulations of most, if not all, of the required elements of notice and prescription. As such, this Court is

confronted with matters of first impression. The trial court relied upon published studies, water levels and lay opinion as proof of notice.

(b) *The Published Studies Relied Upon By The Trial Court Do Not Support A Finding Of Notice Of Overdraft As Defined By San Fernando*

The trial court found that the basin was in overdraft during some periods but not in others. The trial court found overdraft in three time periods; 1944-1951, 1953-1957 and 1959-1967. (C.T.-1,Vol.28,pg.7157:21-22) The trial court relied upon three studies as proof of notice of overdraft, including Bureau of Reclamation Report, 1951, Worts Geologiocal Survey, 1951 and Miller & Evenson, 1966. (C.T.-1,Vol.28,pg.7159:1-15) As discussed *infra,* all elements necessary to prove prescription, including notice, must exist continuously and contemporaneously during the same five year prescriptive period.

The 1951 studies could not have provided notice prior to 1951 when the studies did not exist. Further, the trial court found overdraft in 1944-1951 but not in 1952. Accordingly, a study from 1951, based upon earlier pumping data, could not provide notice sufficient to require a landowner to file a lawsuit to protect groundwater rights, when the overdraft ended in 1952.

Finally, the 1951 studies obviously could not, and did not, determine that two subsequent overdraft periods would occur after 1951. In fact the contrary is true. When the Bureau study was published in 1951, it simultaneously identified a prior water shortage problem and determined that the Twitchell Reservoir was the solution to the problem stating:

> The project would provide an average yield of 21,200 acre-feet per year which would permit full development of 44,000 acres, **overcoming the annual overdraft** of 16,450 acre-feet, and also provide 4,750 acre-feet annually for repulsion of sea-water.

(Phase 4, Exhibit X, pg v and pg 42) (emphasis added)

The study identified the problem and the cure at the same time. The other 1951 study relied upon by the court reached a similar conclusion. (Phase 3, Exhibit F-7, p. 129-131) Accordingly, the 1951 studies clearly cannot be read to provide notice to a landowner that the landowner must sue to protect groundwater rights. Misinterpretation of the reports would have been avoided if the court had not, over Appellants' objections, admitted extensive hearsay documents which could not be effectively rebutted as discussed below.

The 1966 study was published too late to impart timely notice of the 1944-51 and the 1953-57 periods of overdraft relied upon by the trial court because these studies did not exist when notice must have been proved. The 1966 study also was published to late to provide notice of alleged overdraft in each of five continuous years within the 1959-67 overdraft period. At most, the study would have provided notice of alleged overdraft in two years within that period, those being 1966 and 1967.

More importantly, none of these studies could possibly have provided notice of overdraft as defined by *San Fernando*, since *San Fernando* was not decided until 1975. These studies did not evaluate overdraft in the legal context as defined by *San Fernando*. For example, these studies did not evaluate exhaustion of temporary surplus and maximization of water use based upon California Constitution, Article X, Section 2.

Finally, none of these studies evaluated the entire water basin that was at issue in the underlying action. (Phase 3, Exhibit F-5, Phase 3, Exhibit F-7 and Phase 3, Exhibit F-9) The basin identified by the court in the underlying action was larger and more comprehensive than the study areas analyzed in the studies relied upon by the trial court. Accordingly

such studies could not have imparted notice of the condition of the basin as a whole as identified by the trial court in Phase 2.

(c) *Evidence of Water Levels Cannot Without More Impart Notice As Required By San Fernando*

The temporary surplus concept and maximum use requirements required by *San Fernando*, make clear that overdraft cannot commence until levels in the basin have been drawn down sufficiently to maximize the yield of the basin. *Pasadena's* simplistic discussion of falling water levels as an indicator of overdraft is not controlling nor was it intended to be a determination of what must be shown factually to prove overdraft. Elements required to prove overdraft were stipulated in *Pasadena*.

San Fernando was decided by the Supreme Court much more recently, discusses proof of overdraft in a detailed manner, and therefore is controlling. As noted, this Court may be the first court to evaluate factually what is required to prove overdraft and prescription. Water levels cannot impart notice of overdraft because a water user observing falling levels has no way to know whether the decline is the beneficial effect of drawing down the basin to maximize use as constitutionally required, or a harmful event leading to depletion and destruction of the water resource. The trial court's reliance on ground water levels as a basis to prove notice was error.

(d) *Lay Opinion Relied Upon By The Trial Court Cannot Provide A Legal Basis For Notice Of Overdraft As Defined By San Fernando*

For proof of notice, the trial court relied upon lay testimony of two individuals who testified to water shortage in 1953 hearings prior to construction of the Twitchell Reservoir. (Phase 4 Decision, C.T.-1,Vol.28,pg.7159:16-7160:19) As noted above, proof of water shortage is insufficient. Further, overdraft as defined by *San Fernando* requires expert hydrogeological opinion including a determination of exhaustion of

temporary surplus. Lay opinion is insufficient for this purpose and cannot properly provide a basis for notice of overdraft.

Finally, the construction of Twitchell Reservoir, was approved in 1954 (C.T.-1,Vol.28,pg.7165:19) to correct the water shortage, would have provided notice that no lawsuit or injunction was necessary to protect a landowners pumping rights since the reservoir was being constructed to remedy any water shortage.

(e) *Unreliable Hearsay Cannot Provide Notice Of Specific Conditions Which Legally Constitute Overdraft.*

Appellants objected to the introduction of a large volume of hearsay documents, including the studies and lay opinion discussed above. The trial court overruled Appellants' objection. (Phase 4 Decision, C.T.-1,Vol.28,pg.7158, Note 4)

The studies contained the opinions of non-testifying experts. Appellants objected to this unreliable hearsay with no ability to cross-examine the author of such documents. Hundreds of pages of documents were admitted by the trial court. As a practical matter, it would have been impossible for Appellants to refute and or address all of the comments, statements and innuendo, non expert and otherwise, contained in these documents. It likewise would have been impossible to place each landowner on the stand to discuss his or her knowledge of any of these documents and what notice this imparted, if any. Accordingly, admission of the documents was very prejudicial to Appellants. Without the admission of these documents there would have been no evidence of notice and no basis for a finding of alleged prescription against Appellants.

Further, the trial court's statement that it does not matter whether the information is reliable or correct is wrong as a matter of law. As noted above, general notoriety of groundwater conditions is insufficient based

upon the specific notice requirements set forth by the Supreme Court in *San Fernando*. Further, if the hearsay information is inaccurate or otherwise unreliable, it would not trigger an obligation to file a lawsuit.

(xiv) The trial court erred in finding prescription absent proof of the amount of the prescriptive loss in priority as against each of Appellants' parcels.

The trial court erred in finding that prescription operated in favor of Santa Maria and Golden State absent proof of the scope or amount of the loss in priority that applied to each of the Appellants' parcels. The trial court acknowledged this lack of proof stating:

> Without a quantification of the pumping history of the LOG and Wineman parties, as well as of any other water producers, **the court at this time cannot determine the effect that prescription has** on any such other water producer or party. And not having jurisdiction over the other stipulating parties, or evidence from them, none of the information necessary to decide the issue is available to the court. (Emphasis added.) (Phase 5 Decision, C.T.-1,Vol.28,pg.7141:11-15)

As discussed above in the section on quiet title relief, in place of required proof of the amount of loss of priority, the trial court improperly suggested that the evidence could be offered in some later hearing. The trial court's conclusion that the amount can be determined in the future was error. California law requires that judgments be complete and final.

A failure of proof requires Judgment against the party bearing the burden of proof.

(xv) The trial court erred in finding prescription in the absence of proof that the required elements of prescription existed continuously and simultaneously during any five year period.

As noted *supra*, the trial court found overdraft in three time periods. The trial court determined that the "lowest continuous amount of

water pumped by the City and Golden State" was 5100 afy for the City and 1900 afy for Golden State. (Phase 4 Decision, C.T.-1,Vol.28,pg.7161:10-14) However, the only proof of alleged pumping in these amounts offered by Santa Maria was for the 1959-1967 time period. (Phase 4, Exhibit MM) Accordingly, only this time period could properly be relied upon as a basis for pumping in this amount.

Additionally, the law is settled that all elements of a prescriptive claim must be proved to exist continuously and simultaneously for the entire prescriptive period. In this case, the trial court made findings that some elements were in place for periods exceeding five years. However, the court did not find, nor is there any substantial evidence to support, a finding that all of the elements were in place **simultaneously**.

(xvi) The trial court erred in failing to require proof of prescription by clear and convincing evidence.

The trial court properly required proof of overdraft, to support a claim of prescription, by clear and convincing evidence in the Phase 3 Statement of Decision. The trial court found that overdraft was not proved and stated that this finding disposed of the prescription claims. (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:25-27)

However, when the trial court reached a contrary conclusion following Phase 4, the trial court made no findings by clear and convincing evidence. Neither the Statements of Decision nor the Judgment find that all required elements of the prescriptive claims were proved by clear and convincing evidence. In fact, the Purveyor Parties failed completely to meet this burden of proof.

(xvii) The trial court erred in omitting from the Judgment its finding as to the nature and affect of the prescriptive right transferred by prescription.

The trial court described the prescriptive right awarded as follows:

> [The prescriptive] rights are usufructuary and are correlative to the same extent that an overlying owner's rights are correlative. The Public Water Producers who established prescriptive rights are entitled to those specific quantities of water in the Basin, the same as any overlying landowner, so long as there is sufficient water in the aquifer. They also have a priority over other appropriators in those circumstances, just as an overlying owner has a priority over appropriators when there is no surplus.
> (Phase 5 Decision, C.T.-1,Vol.28,pg.7138:15-20)

Judgments must be complete and final. Failure to include the trial court's finding as to the nature of the right transferred by prescription in the Judgment, will result in future speculation as to the legal and factual affect of the trial court's findings on this issue. This will result in problems enforcing the Judgment pursuant to the continuing jurisdiction of the court and will result in a cloud on Appellants' title.

(4) The Trial Court Erred In Failing To Declare The Amounts Of And Priority Of Appropriative Rights.

Each of the Purveyor Parties claimed appropriative rights and asked for a determination of those rights in their declaratory relief causes of action. Santa Maria (C.T.-1,Vol.27,pg.7004, Paragraph 10) Nipomo (C.T.-1,Vol.2,pg.270:3)Rural (C.T.-1,Vol.3,pg.667:5-6)Golden State (C.T.-1,Vol.1,pg.243:3-5)Northern Cities (C.T.-1,Vol.11,pg.2945:2-4)

The Purveyor Parties failed entirely to introduce evidence to prove any claimed first in time, first in right, appropriative priority rights. The trial court will be unable to exercise continuing jurisdiction to protect the rights of the parties unless the Judgment reflects that no appropriative rights were proved.

(5) The Trial Court Erred In Awarding The Purveyor Parties Groundwater Rights Based Upon Surface Water Imported From Outside The Watershed Of The Basin.

(i) The general rule: water used and released into a stream or water basin is unappropriated water subject to appropriation by all water users.

The *California Constitution*, Article X, Section 2, provides as follows:

> It is hereby declared that because of the conditions prevailing in this State the general welfare that the water resources of the State be put to beneficial use to the **fullest extent of which they are capable,** and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to **the reasonable and beneficial use thereof in the interest of the people and for the public welfare**....
> (Emphasis added)

Accordingly, all water, whether stream water or groundwater, must be put to maximum use.

Water Code §1202 provides as follows:

> "The following are herby declared to constitute unappropriated water: . . . "(d) Water which having been appropriated or used flows back into a stream, lake or other body of water."

Water Code §1202 recognizes and implements the constitutional mandate that water be put to maximum use by providing that once water is used and flows back into a stream, lake or other body of water, it becomes unappropriated water available for use by anyone else who needs such water.

(ii) Historically, an importer of surface water had a right to exercise priority over the imported water.

Historically, transfer of surface water from one watershed to another by means of streams, ditches and pipes became a common practice. Unsurprisingly, disputes arose over rights to use of surface water that had been transferred from one watershed to another. Case law developed

resolving how rights to imported water would be adjudicated within the California groundwater priority system.

Consistent with the maximum use concept, early cases established that when imported water was not used by the importer, others could appropriate such water. *Crane v. Stevinson* (1936) 5 Cal.2d 387, 394-395. *Crane v. Stevinson* further established that even after a period of non-use, once the importer's need to use the water resumes, he may once again exercise priority over the use of the imported water. (*Ibid.*)

The holding in *Crane v. Stevinson,* was confirmed and amplified three years later in *Stevens v. Oakdale Irrigation District* (1939) 13 Cal.2d 343, 348-350. Once again, the Supreme Court, consistent with the maximum use concept, confirmed the right of others to the use of the imported water when it was not used by the importer.

Eleven years later, the Supreme Court decided the case of *Stevinson Water District v. Roduner* (1950) 36 Cal.2d 264. The *Roduner* court explained the priority right in the context of the maximum use requirements of the *California Constitution*, as follows:

> Under this [Constitutional] provision, **whenever water in a natural stream or watercourse, such as Owens Creek, is not reasonably required for beneficial use by the owners of paramount rights,** whether the water is foreign or part of the natural flow, **such owners cannot prevent use of the waters by other persons**, and the water must be regarded as surplus water subject to appropriation by those who can beneficially use it. **No injunction may issue against the taking of surplus or excess water**, and the appropriator may take the surplus without giving compensation.
> (*Id.* at 270. (Citations omitted.))

> Thus the section [of the *Water Code*] **does not give a district the right to capture or retain water in a natural stream when it has no use for the water**, when it can find no willing purchaser, and when the water will be wasted unless it is taken by persons located along the stream who can put it to a

beneficial use. **Any other construction of the statute would render it unconstitutional.**
(*Id.* at 271. (Emphasis added.))

(iii) Courts extended surface water priority law to groundwater.

The aforementioned cases involved imported surface water which was introduced into **surface** streams. It was not long before our courts were called upon to adjudicate disputes over imported surface water which was introduced into **groundwater** basins. To decide these disputes, California courts relied upon these surface water cases and found a "priority" right to imported groundwater. Two of the earliest cases which addressed a priority based upon imported water introduced into a groundwater basin were *Glendale* and *San Fernando*.

Glendale and *San Fernando* both involved importation of water by the City of Los Angeles to the San Fernando Valley for purposes of providing a municipal water supply for the emerging San Fernando Valley. The source of the imported water was outside the San Fernando Valley watershed, primarily in the Owens Valley to the north. This water was to be imported to the San Fernando Valley through the Los Angeles aqueduct.

The City of Los Angeles conducted analysis and engineering for the purpose of determining whether the imported water could be transferred and ultimately recovered by the City of Los Angeles in the San Fernando Valley. "The Los Angeles Aqueduct had been planned and located to facilitate the availability and recapture of such return waters." *San Fernando, supra,* at 257. The City of Los Angeles intended that the imported water "would return to the ground after use and thereby become available for recapture in its wells in the southeastern part of the valley where it had been extracting water since the turn of the century." *Id.* at 211. The City concluded that such water could effectively be imported into

the San Fernando Valley and withdrawn by the City form its groundwater wells. *Id.* at 259.

In practice, the imported water was percolated into the San Fernando Valley groundwater basin, through percolation ponds and/or sold to farmers with the intent of percolating this water into the groundwater basin and recovering it. *Glendale, supra,* at 76; *San Fernando, supra,* at Note 51.

(iv) Recovery of imported groundwater commingled with native groundwater requires that the importer maintain the physical ability to recapture the water.

In order to recover imported water commingled with native water, the importer must maintain dominion and control over the imported supply. *San Fernando, supra,* at 255-263; *Glendale, supra,* at 76-78. Recovery of imported groundwater commingled with the native supply requires that the importer maintain the physical ability to recapture the water. *Ibid.* As noted above, by appropriate engineering analysis, the City of Los Angeles imported and percolated surface water into the groundwater basin in such a manner that it could be withdrawn by the City's groundwater wells. "When the developing entity has no ability to recapture the supply, the water is considered abandoned and is subject to appropriation by secondary users." *S. Slater, California Water Law and Policy* (2009) §§ 7.09, 7-20 to 7-21.

(v) Importation of water must not injure the water rights of other water users.

In order to claim a right to imported water, the importer must show that the importation of such water does not injure any other water user's ability to use the natural supply. *Stevens v. Oakdale Irrigation District, supra,* at 350-353. This so called "no injury rule," requires that an importer take no action in the importation of water which endangers the water rights

of any other water user. The no injury rule has its roots in legislative enactment of former *Civil Code* §1413, now *Water Code* §7075, which provides as follows:

> Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the **water already appropriated by another shall not be diminished.**
> (*Water Code* §7075. (Emphasis added.))

The surface water cases describe the no injury rule as follows:

> [The importers] . . . have the **right to carry said water** in said channel, "and to reclaim the same, **but without diminishing the quantity or impairing the quality of other waters** flowing in the stream ... but in reclaiming it the water already appropriated by another must not be diminished.
> (*Crane v. Stevinson, supra,* at 395.)(Emphasis added.)

In a groundwater basin, injury would result if the basin has no storage capacity and introduction of imported water results in basin spill and a displacement of the native supply. Such spill of the native supply would result in injury to water users with rights to the native supply by decreasing the water supply. "**Thus in the event of basin spill, the foreign or imported water should be deemed to spill first.**" *S. Slater, California Water Law and Policy* (2009) §§ 11.10, 11-50-11-51.

(vi) The importer has a priority right to use the water it imports as against other potential water users.

As noted above, importation of water provides the importer with a priority right to use such water based upon the needs of the importer. *Crane v. Stevinson, supra*, at 394. However, the priority right does not extend to water that is not reasonably required for beneficial use by the owners of paramount rights. *Stevinson Water District v. Roduner, supra*, at 270. The importer may not "prevent use of the waters by other persons". *Ibid.* The water "must be regarded as surplus water subject to appropriation by those who can beneficially use it." (*Ibid.*) The *San Fernando* court found that **water in excess of the safe yield,**

which included imported water, **was surplus and subject to appropriation by anyone who needs such water**. *Id.* at 278-279. In fact, "no injunction may issue against the taking of surplus or excess water." *People v. Shirokow* (1980) 26 Cal.3d 301, 320.

Accordingly, California law requires that all reasonable and beneficial groundwater uses are constitutionally encouraged and allowed so long as cumulative extractions do not exceed the annual safe yield, in which case extractions could be enjoined. The law is clear that to maximize use, the imported right in groundwater, as in surface water cases, is a "priority" right.

(vii) The *Water Code* prevents municipalities from retaining rights to unused water.

The common law rule and constitutional mandate that allows other water users to use water which is not currently needed by a party with a priority right, applies specifically to municipal water purveyors. *Water Code* §1203 provides as follows:

> Any water the right to the use of which is held by any municipality which is in **excess of the existing municipal needs therefore may be appropriated by any person entitled to the possession of land upon which such excess water may be put to beneficial use** but the right of such person to use such water shall continue only for such period as the water is not needed by the municipality. This section supplements but does not otherwise affect Sections 1460 to 1464, inclusive.
> (emphasis added)

Santa Maria is a municipality and clearly governed by the statute. The same common law rules and constitutional mandate applies to Golden State which is a regulated public utility providing service to urban customers, whether or not Golden State is a municipality.

Likewise, *Water Code* §106.5 provides:

> It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to

> the use of water should be protected to the fullest extent necessary for existing and future uses, but that **no municipality shall acquire or hold any right to waste water**, or to use water for other than municipal purposes, **or** to **prevent the appropriation and application of water in excess of its reasonable and existing needs** to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefore.
> (*Water Code* §106.5. (Emphasis added.))

Accordingly, water not needed for the existing needs of the municipality, is available for use by other water users and may not be accumulated when others have a reasonable and beneficial need for such water.

(viii) The measure of the imported water priority right is the net augmentation to the natural flow and/or native yield.

The measure of the imported water priority right is the "net amount by which the reservoir is augmented" resulting from importation of water from outside the watershed. *San Fernando, supra,* at 262. Taking out more than the net augmentation resulting from importation would violate the "no injury rule" by decreasing the native supply available to other water users and would result in a water right greater than the benefit conferred.

Determination of 'net augmentation to the supply,' requires proof of how much of the imported surface water is consumptively used and therefore does not find its way into the groundwater basin. Additionally, the claimant must prove that water entering the groundwater supply actually adds to the supply as opposed to merely displacing part of the already existing supply.

(ix) Exercise of an imported water priority right.

In a time of shortage, the importer of surface water into a stream or other watercourse may exercise a priority over other water users on that stream or watercourse by diverting water from the stream. Likewise, in a time of shortage, a party which uses a water basin to convey groundwater to an extraction point, may exercise a priority to this groundwater. However, the importation of such water may not injure other water users and the priority right is measured by net augmentation and constitutionally limited to the current needs of the importer.

(x) *Water Code* §1210 cuts off the rights of the importer in favor of a water treatment facility owner.

The evolution of imported water rights led to an inevitable conflict between water importers and water treatment plant owners who treated waste water after domestic use. Based upon *Glendale* and *San Fernando*, the importers claimed recapture rights to the imported water which otherwise would be waste water unfit for any purpose. Legislation ultimately was enacted to address this conflict. California *Water Code* §1210 provides as follows:

> The **owner of a waste water treatment plant** operated for the purpose of treating wastes from a sanitary sewer system **shall hold the exclusive right to the treated waste water as against anyone who has supplied the water discharged into the waste water collection and treatment system,** including a person using water under a water service contract, unless otherwise provided by agreement. .....

At least one commentator has correctly stated the effect of *Water Code* §1210 on the rights of the importer stating:

> As a result, those **parties importing** or developing a water supply that allow the water to be sent to a wastewater treatment facility **are without rights** in the return flows from the developed water **once it reaches the treatment facility**.
> (*S. Slater, California Water Law and Policy* (2009) §§ 7.07, 7-15. (Emphasis added.))

Accordingly, regardless of whether the water is imported or native, once the water is treated by the water treatment plant, the water treatment plant owner has the right to exercise dominion and control over this water in such ways as are legally appropriate and subject to the no injury rule.

Once released, the reclaimed water is unappropriated pursuant to *Water Code* §1202(d) and as constitutionally mandated. Even if the treated water was not abandoned, the released water, is unfit for human consumption and could not create a groundwater right to pump water for human consumption.

(xi) Four of the Purveyor Parties' declaratory relief actions requested a priority to water imported by the State Water Project.

The declaratory relief actions filed by Santa Maria, Golden State, Pismo and Oceano, requested groundwater priority rights based upon State Water Project water imported from outside the Santa Maria basin.watershed. (Santa Maria - C.T.-1,Vol.27,pg.7010-7012; Golden State - C.T.-1,Vol.1,pg.244-245; Pismo and Oceano - C.T.-1,Vol.11,pg.2946:2-7)

(xii) These Purveyor Parties failed to prove that they hold the rights to imported water from the State Water Project.

The State Water Project ("SWP") was created by the legislature and is codified in *Water Code §12930*, et seq. The State of California owns the project including all transmission aqueducts and transmission facilities. A party may contract with the State of California to receive an "entitlement" to water from the SWP. The entitlement is not a guarantee to any particular amount of water. To the contrary, the, contracting parties receive a percentage, proportionate share, of their entitlement depending upon water conditions which varies from year to year. (Phase 3, Exhibit E-15) The

contracting parties receive the water from the State or its designee at 'turnouts' located **within the watershed** of the basin. (R.T.-1,Vol.38,pg.7296:20-7297:2) The Purveyor Parties merely proved they hold contract-based entitlements to water if it is available. (Phase 4, Exhibit OO)

California cases uniformly identify the holder of the right as the entity importing the water into the **watershed.** *San Fernando, supra,* at 261. There was no substantial evidence that the Purveyor Parties imported the water. In fact, the water was physically transported into the water shed by the State of California and delivered at turnouts **within the watershed.** (R.T.-1,Vol.38,pg.7282:25-7283-4; Phase 4, Exhibit RR; R.T.-1,Vol.38,pg.7295:18-27; R.T.-1,Vol.38,pg.7308:13-18; R.T.-1,Vol.39,pg.7407:11-28)

Evidence in the trial court confirms that the State Of California owns the diversion rights as well as all transmission facilities to import the water from northern California through the watershed of the Santa Maria Basin to additional destinations in Southern California. (Phase 3, Exhibit E-14; R.T.-1,Vol.14,pg.3794:17-3795:3; R.T.-1,Vol.11,pg.2938:5-11; R.T.-1,Vol.38,pg.7296:20-7297:2

The Purveyor Parties may not properly claim rights to imported water based upon on the rights or actions of the State of California.

(xiii) The importation of water through the State Water Project creates no imported water rights.

California *Water Code* §12930, et seq. make clear that the legislature did not create any new water rights based upon delivery of water from the SWP. Section 12931 provides:

> The enactment of this chapter shall **not be construed as creating any right to water** or the use thereof nor water rights except as **expressly** provided herein.
> (Emphasis added.)

Nowhere does the Water Code create any private party right to reclaim water imported by the SWP.

(xiv) Even if these Purveyor Parties were the importers of the water, the trial court erred in failing to require proof that these Purveyor Parties maintained the physical ability to recapture the water, and there was no substantial evidence to support such a finding.

In sharp contrast to the factual circumstances of this case:

> .....the Los Angeles Aqueduct had been planned and located to facilitate the availability and recapture of such return waters. *San Fernando, supra,* at 257.

> [The City of Los Angeles] intended that the imported water "would return to the ground after use and thereby become available for recapture in its wells in the southeastern part of the valley where it had been extracting water since the turn of the century."
> *San Fernando, supra,* at 211

The trial court in this case, failed to require any proof that Purveyor Parties maintained the physical ability to recapture SWP water from purveyor groundwater wells. Unlike the City of Los Angeles, in *Glendale* and *San Fernando*, Purveyor Parties presented no evidence of any analysis or engineering showing that any SWP water could be withdrawn from purveyor diversion works. (R.T.-1,Vol.38,pg.7294:7-14) In fact, the undisputed evidence was that **the purveyor diversion works are not down gradient from the sewer plants where the alleged return flows are deposited.** (R.T.-1,Vol.38,pg.7302:3-23; Phase 4, Exhibit RR)

Accordingly, imported water could not possibly have been withdrawn from the diversion works of these Purveyor Parties or en route to their diversion works as required by *Glendale* and *San Fernando*.

(xv) The trial court erred in awarding imported water rights in the absence of proof by Purveyor Parties that importation of water would cause "no injury" to Appellants.

As noted above, in order to claim a right to imported water, the importer must show that importation of such water does not injure the natural supply. *Stevens v. Oakdale Irrigation District, supra,* at 350-353. The uncontradicted evidence in the trial court was that the Santa Maria Basin is full and spills into the ocean. (R.T.-1,Vol.40,pg.7504:14-19) Accordingly, imported SWP water likely would displace the native water supply thereby injuring the rights of Appellants and others. The purveyors introduced no proof to the contrary.

(xvi) The trial court erred as a matter of law in quantifying the imported water right awarded to Santa Maria and Golden State, based upon 'gross augmentation' rather than 'net augmentation.'

(a) Net Augmentation.

The trial court properly described the measure of an imported water right in the Phase 4 Statement of Decision as follows:

> Those Public Water Producers who import State Water Project water to the basin have established a prior right to the return flows generated from the use of that supply **to the extent** that such imported water **net augments** the basin.
> (Phase 4 Decision, C.T.-1,Vol.28,pg.7173:5-8) (Emphasis added.)

However, the Judgment fails to require proof of net augmentation. The Judgment drops the word 'net,' providing as follows:

> ... to the extent that such water **adds to** the supply of water in the aquifer and if there is storage space in the aquifer for such return flows.
> (Emphasis added.) (Judgment, C.T.-2,Vol.2,pg.4:13-20)

(b) *The Purveyor Parties Failed To Offer Any Evidence Of Net Augmentation.*

The trial court quantified the net augmentation as a fixed percentage of SWP imports. (C.T.-2,Vol.1,pg.4:18-20)

There is no substantial evidence supporting this finding. Evidence was offered to prove the percentage of imports **that reach** the treatment plants. However, no evidence was introduced regarding how much of this water net augments the water basin **after leaving** the treatment facility. The percentage awarded reflects **gross** augmentation to the water treatment facility, not net augmentation to the groundwater basin as required by law.

No witness testified that water released to the treatment plant remained in the basin, or if so, how much remained. Uncontradicted testimony established that the percentage of water released to the treatment facility was not *net* augmentation to the supply. (R.T.-1,Vol.40,pg.7508:8-16) Additionally, since the water basin overflows and spills to the ocean, there was no proof of space in the aquifer for treated wastewater to accumulate.

There also was no proof of the quality of the treated water. Logically and legally, treated waste water, still being unfit for human consumption, would not create a groundwater right to pump water for human consumption.

(c) *The Judgment Improperly Permanently Quantifies The Imported Right.*

The trial court erred as a matter of law in awarding an imported water right based on a fixed percentage of imported water. As noted supra,

the Judgment quantifies the imported water right as a fixed percentage of SWP imports. (Judgment, C.T.-2,Vol.1,pg.4:13-20)

The trial court improperly permanently fixes the percentage of the return flow. Uncontradicted testimony established that the percentage of return flow can change over time based upon changing water use between irrigation and domestic use. (R.T.-1,Vol.38,pg.7285:23-7286:6) Also, the percentage merely represents the percentage of SWP water which reaches the water treatment plant, not net augmentation to the basin. (R.T.-1,Vol.38,pg.7283:23-25)

Because the types of water use change over time, a permanent fixed percentage cannot be set. The breakdown of how imported water is used, as between water flushed into the sewer system versus water used for irrigation, will change form year to year. Accordingly the types of water use must be evaluated at the time the imported water claim is made. The Purveyor Parties presented no evidence of the breakdown of domestic versus irrigation water use for any particular year nor the actual amount of water imported in any particular year.

Awarding a future right, not ripe for adjudication and based upon speculation as to future conditions was error. Where, as here, a surplus exists, our courts should not 'peer into the future' to when 'demands ..... [are] brought into conflict.' *Glendale, supra,* at 79.

(xvii) The trial court erred in awarding an imported water right in the absence of proof of available storage space.

The Judgment allows storage of return flow water ".if there is storage space in the aquifer for such return flows". (Judgment, C.T.-2,Vol.1,pg.4:13-17) As discussed supra, parties importing water have no right to accumulate water they do not currently need. They either use it or

others use it. In the absence of the legal right to accumulate groundwater, there is no basis to award storage rights. Therefore, right to use a groundwater basin to convey water to an extraction point and the priority right to use such water, does not confer a reciprocal right to store water.

Nevertheless, undisputed testimony was that the basin has always been spilling into the ocean and that it must be kept in this condition to avoid seawater intrusion. (R.T.-1,Vol.12,pg.3316:11-3317:13) There was no proof of any available storage space.

Net augmentation in the past has been impossible. Net augmentation also will likely not occur in the future because basin water will continue to flow into the ocean to prevent seawater intrusion, preventing any storage space for imported water. In the extremely unlikely circumstance that storage space does somehow exist in the future, the trial court under continuing jurisdiction has the ability to hear such claims at that time.

(xviii) The trial court erred in awarding imported water rights to the Northern Cities in the amount of 1,300 acre feet per year.

(a) *The Award.*

The Judgment awards the "Northern Cities" "a prior and paramount right to produce 7,300 acre feet of water per year from the Northern Cities Area of the Basin." (Judgment, C.T.-2,Vol.1,pg.4:21-24) The Phase 4 Statement of Decision declares that 1,300 afy of this amount is based upon water entitlement from the SWP, declaring:

> .....the combination of the Lopez Reservoir, State Water Project imports, percolation ponds, and return flows equals approximately 7,300 acre feet of water per year.
> (Phase 4 Decision, C.T.-1,Vol.28,pg.7168:23-7169:25)

> The Northern Cities purchase and import an **average** of 1,200 acre feet" annually from the State Water project, which saves pumping from the aquifer. Their use of this imported water

also augments the groundwater supply by approximately 100 acre feet per year of return flows.
(Phase 4 Decision, C.T.-1,Vol.28,pg.7168:23-25) (Emphasis added.)

The other 6,000 afy of the total award of 7,300 afy is discussed elsewhere in this brief, in the discussion of rights to water from the Lopez Reservoir, *infra.* The award of 1,300 afy is discussed below.

The only testimony presented discussing 1,300 afy was through Purveyor Party expert, Iris Priestaff, who testified as follows:

Q. DO THE NORTHERN CITIES ALSO IMPORT WATER FROM THE STATE WATER PROJECT?

A. YES, THEY DO.

Q. HOW MUCH?

A. THE TWO OF THE ENTITIES, PISMO BEACH AND OCEANO CSD, **IMPORT *ABOUT* 1,200 ACRE FEET PER YEAR** OF STATE WATER PROJECT WATER INTO THE NORTHERN CITIES AREA.

"Q. AND DOES THE USE OF STATE WATER IMPACT THE WATER SUPPLY IN THE NORTHERN CITIES AREA?

A. WELL, IT'S IMPORTANT BECAUSE THEY ARE USING THE STATE WATER PROJECT WATER INSTEAD OF GROUNDWATER, THUS, CONSERVING THE GROUNDWATER IN THE GROUNDWATER BASIN

Q. AND HAVE YOU CALCULATED THE RETURN FLOWS IN THE NORTHERN CITIES AREA FROM THE USE OR YOU MIGHT CALL IT REUSE OF THE RETURN FLOWS?

A. I QUANTIFIED THE STATE WATER PROJECT IMPORT **RETURN FLOWS AT *ABOUT* 100 ACRE FEET PER YEAR.**

(R.T.-1,Vol.14,pg.3703:3-22)

(b) ***The Trial Court Erred In Awarding 1,200 Acre Feet Per Year To The Northern Cities.***

First, as noted previously, the Northern Cities is not a legal entity. An award to a non-entity is improper.

More importantly, mere importation of water simply does not create a new groundwater right, even if the importer uses the imported water rather than using groundwater. Nor does conduct 'benefiting the basin' give rise to any new groundwater right. No statute or case law creates a new groundwater right based upon using imported water instead of using groundwater.

However, importation of water under appropriate circumstances, as discussed *supra*, may give rise to a priority right to recover the return flows attributable to the imported water. The award of a 1,200 afy groundwater right based on an import, as distinct from the return flow attributable to that import, is without legal basis and was error.

(c) ***The Trial Court Erred In Awarding Return Flow Rights To The Northern Cities In The Amount Of 100 Acre Feet Per Year.***

The trial court erred in awarding the so called Northern Cities return flow rights for two reasons. First, the northern parties failed entirely to prove a proper legal basis to claim imported water rights as required by *Glendale* and *San Fernando*, discussed at length *supra*.

Second, these parties failed to prove net augmentation to the groundwater supply. The testimony of expert Priestaff was insufficient as a matter of law to prove net augmentation. She testified to no scientific analysis and relied upon estimated amounts which possibly could be available through the SWP concluding that the northern parties "import

about 1,200 are feet per year" with "return flows at **about** 100 acre feet per year."

The reason for Ms. Priestaff's inability to give testimony to an actual amount of return flows is understandable given the nature of the SWP. As noted supra, SWP water is not guaranteed, is only an entitlement and availability varies year to year. Quite clearly, the amount of potential return flow will vary with the variable amount of imported water.

The Phase 4 Statement of Decision set forth above highlights the failure of proof. As the trial court stated, "The Northern Cities purchase and import an **average** of 1,200 acre feet annually from the State Water project ...." This finding on its face is an improper average of past annual importation.

Ms. Priestaff did not testify to actual importation of any particular quantity of water during any particular time period. Additionally, none of the northern parties proved how much each entity imported, making an award to each entity impossible. Finally, Ms Priestaff did not testify to how much water could, or will be, available to import in the future. She also did not testify to how much water either of these entities will choose to import in the future. The fact that she could not possibly give this testimony shows exactly why a perpetual return flow right cannot as a matter of law be awarded and why the trial court erred in making this award.

(d) *The Judgment Is Ambiguous About The Geographic Reach Of The Northern Cities' Priority.*

As noted above, the Judgment provides that "The Northern Cities have a prior and paramount right to produce 7,300 acre-feet of water per year from the Northern Cities Area of the Basin." The Judgment implies, but does not explicitly state, that the 7,300 afy in priority awarded to the

Northern Cities operates only against pumping in the Northern Cities Area. If any part of the 7,300 afy priority is confirmed, the Judgment must make clear that the priority operates only against pumping located within the so-called Northern Cities Area.

(xix) *Water Code* §1210 cuts off imported water rights

The undisputed evidence in the trial court was that Golden State Water Company sends its imported wastewater to a treatment facility owned by Laguna Sanitation District. (R.T.-1,Vol.39,pg.7417:7-7418:1) Absent an 'agreement' between Golden State and Laguna, *Water Code* §1210 operates to cut off Golden State Water Company's rights to the imported water, whatever those rights may be, once it reached the treatment facility. Although the Stipulation suggests that such rights may have been conveyed to Golden State, the Stipulation was not introduced nor litigated by Golden State as evidence in Appellants trial and has no evidentiary value. Further, Laguna was not a party in Phases 4 and 5 and accordingly had no ability to either confirm or deny a transfer of such rights.

Additionally, both Santa Maria and Laguna Sanitation District percolate treated effluent into the ground at treatment facilities which are down gradient from Santa Maria's and Golden State's groundwater wells. As discussed supra, neither Santa Maria nor Golden State maintained dominion and control over the percolated effluent. Both failed to maintain the ability to recapture this water. Accordingly, this water was abandoned and unappropriated water which may be used by water users with rights to the native supply as discussed above.

Even if Santa Maria had maintained dominion and control of the percolated effluent, the nature and quality of any right created thereby would be questionable. Effluent water has limited uses and is not equivalent to groundwater. Trading treated effluent water not fit for human

consumption, for groundwater fit for human consumption, would not be in the public interest and would potentially cause injury to other water users. No evidence was presented in the trial court regarding the practical, hydrogeologic or legal ramifications which would result from awarding a groundwater right based upon the percolation of treated effluent water. Accordingly, even if Santa Maria had proved that it maintained dominion and control over such water, there was no substantial evidence of the other requirements of claiming an imported water right as discussed above.

(xx) The trial court erred as a matter of law in awarding storage rights.

As discussed supra, no storage space was shown to exist. The terms and conditions of so-called "temporary storage" will be different depending upon future water use and conditions in the basin. Awarding such rights now, in the absence of critical information about future conditions in the basin, the number of groundwater users and the relative priorities of such users is inappropriate and is not ripe for determination. If and when there is storage space in the basin and with proper proof of all requirements to prove an imported water right, a future trial court may consider an importer's rights to temporary use of storage space pursuant to *Water Code* §7075.

(xxi) The trial court erred as a matter of law in failing to properly declare the nature of the imported water right awarded to the Purveyor Parties as a priority.

The trial court properly characterized the nature of the priority right in its Phase 4 Statement of Decision as follows:

> Those Public Water Producers who import State Water Project Water to the basin have established a **prior right** to the return flows generated from the use of that supply, to the extent that such imported water net arguments the basin. **If**

> **those return flows are surplus to the needs of the Public Water Producers, they are available for all users.** (Emphasis added.) (Phase 4 Decision, C.T.-1,Vol.28,pg.7173:5-8.)

Unfortunately, the final Judgment failed to include this proper definition and instead declared the priority right as follows:

> The City of Santa Maria and Golden State Water Company have a **right to** use the Basin for temporary storage and subsequent recapture of the Return Flows generated from their importation of State Water Project water, to the extent that such water **adds to** the supply of water in the aquifer and if there is storage space in the aquifer for such return flows, including all other native sources of water in the aquifer. The City of Santa Maria's Return Flows represent 65 percent of the amount of imported water used by the City. Golden State Water Company's Return Flows represent 45 present of the amount of imported water used by Golden State in the basin. (Judgment, C.T.-2,Vol.1,pg.4:13-20)

The language set forth above, drafted by the Purveyor Parties, **fails to include** the language **"if those return flows are surplus to the needs of the Public Water Producers, they are available for all users,"** which had been included in the Phase 4 Statement of Decision. **Also lacking** in the Judgment declaration is the term **"prior right"** which was included by the trial Judge in the Phase 4 Statement of Decision. As discussed *supra*, the right must be described in a legally correct manner as a priority right. In the absence of these appropriate terms, the Judgment definition is unconstitutional based upon the maximum use requirements of *California Constitution*, Article X, Section 2 and *Water Code* §1202 discussed above. *Stevinson v. Roduner, supra,* at 271.

(xxii) The trial court erred in including incorrect legal definitions in the Judgment.

"Storage Space":

> The portion of the Basin capable of holding water for subsequent reasonable and beneficial uses. (C.T.-2,Vol.1,pg.3:8-9)

Since storage rights were not a litigated issue. The definition is incomplete and potentially would be misleading in the future under continuing jurisdiction. The correct definition of storage space, when properly before the court, will address storage space rights needed for storage of native supply versus storage space for imported water and will address the "no injury" requirement.

> **"Imported Water"**
>
> Water within the Basin received from the State Water Project, **originating outside the Basin**, that absent human intervention would not recharge or be used in the Basin. (Judgment, C.T.-2,Vol.1,pg.2:16-18) (Emphasis added.)

The correct definition should indicate "out of the **watershed**" rather than "out of the **Basin**."

> Return Flows
>
> All water which recharges the Basin after initial use, through the use of percolation ponds and others means, derived from the use and recharge of imported water delivered through State Water Project facilities. (Judgment, C.T.-2,Vol.1,pg.3:1-3)

As noted previously, this definition is incorrect if this Court finds that SWP water does not create an imported water right. Assuming there is ever storage space in the basin in the future, the definition also is under-inclusive since water could be imported from numerous sources outside the watershed.

(6) The Purveyor Parties Asserted Water Right Claims Unsupported By Existing Law.

The Purveyor Parties asserted numerous water right claims, discussed below, which are unsupported by California law. The trial court properly rejected many of these claims but failed to enter judgment accordingly.

(i) The Twitchell project.

The Twitchell Project is a dam and reservoir that was constructed in order to impound water during periods of heavy rainfall and to release this water to the streambed in a timed release manner to maximize recharge to the water basin and to minimize outflow to the ocean. Water released from the Twitchell Reservoir flows into streams and watercourses tributary to the Santa Maria water basin. (R.T.-1,Vol.17,pg.4429:6-25)

All water which collects in the Twitchell Reservoir originates within the watershed of the basin. No imported water is impounded in the Reservoir. Release of water from the Twitchell Reservoir began in 1962. (R.T.-1,Vol.39,pg.7362:21-22) The Project's facilities and water rights licenses are owned by the United States Government. (Phase 4 Decision, C.T.-1,Vol.28,pg.7165:23-25) The project was financed by assessments on local property.

(a) ***Three Purveyor Parties Claimed Rights To Water From Twitchell Reservoir.***

Three of the Purveyor Parties, Rural, Golden State and Santa Maria, asserted a declaratory relief claim requesting priority to water from the Twitchell Reservoir. (C.T.-1,Vol.1,pg.249:14-250:12)(C.T.-1,Vol.3,pg.670:23-671:14)(C.T.-1,Vol.27,pg.7012) As discussed below, these parties failed to prove any basis for priority and the Judgment fails to correctly reflect the court's rulings. The parties asserting priority to Twitchell water, asserted the following theories.

(A1) ***Claimed rights to water from the Twitchell Reservoir based upon past financial contribution.***

The City of Santa Maria, Golden State Water Company and Rural Water Company all claimed a priority to groundwater from the Twitchell Reservoir based upon past assessments paid by their ratepayers. Golden State and Rural offered no evidence of any assessments paid by anyone. Santa Maria presented evidence that as the city grew, assessment payments by its ratepayers proportionately increased. (Phase 4, Exhibit LL)

The trial court rejected the priority claims based upon payment of assessments. (Phase 4 Decision, C.T.-1,Vol.28,pg.7167:18-20) As the court explained:

> The fact that a landowner, municipal or otherwise, was specifically assessed with the cost of constructing and maintaining the Twitchell Project does not confer a vested right or ownership interest in the improvement or entitle the landowner to a certain allocation of the improvement itself. (Phase 4 Decision, C.T.-1,Vol.28,pg.7167:11-14)

(A2) ***Claim that the Water Conservation District transferred rights to water from the Twitchell Reservoir to these Purveyor Parties and to other Stipulating Parties.***

These Purveyor Parties claimed in the trial court that the Santa Maria Water Conservation District, which has the obligation to maintain the Twitchell Reservoir, transferred rights to water from the Twitchell Reservoir to them based upon the Settlement Stipulation entered into by various settling parties claiming:

> The Santa Maria Valley Conservation District has, pursuant to the Stipulation, contractually allocated certain benefits

> associated with the augmented yield derived through Twitchell Project operations to the City, Golden State, the City of Guadalupe, and stipulating overlying property owners whose property lies within the boundaries of the District. (Purveyor Closing Ph. 4 Brief, C.T.-1,Vol.20,pg.5203:19-22.)

The District filed a declaration confirming it held no rights to the Twitchell Project and accordingly could not convey rights it did not own. The District further confirmed that the Settlement Stipulation did not alter appropriative water rights to the Twitchell Project.

> The Conservation District holds no water rights for the Twitchell Project; it simply operates and maintains the Project pursuant to a contract between the Conservation District and the Santa Barbara County Water Agency (Phase 3 Trial Exhibit 1-61). **To the extent that the Public Water Suppliers are asserting that the Conservation District, by entering into the Stipulation, conveyed Twitchell Project appropriative water rights to the Public Water Suppliers or other parties, the Conservation District simply desires to point out to the Court that it has no right to convey that which it does not own. ..... nothing in the Stipulation alters the appropriative water rights for the Twitchell Project**. (Emphasis added.) SMVWCD Declaration of 06-03-14 (C.T.-7,Vol.7,pg.1768:7-23)

The Judgment fails to clearly state that no priority to Twitchell water was proved. The Judgment provides:

> No Party established a pre-Stipulation priority right to any portion of that increment of augmented groundwater supply within the Basin that derives from the Twitchell Project's operation. (Judgment, C.T.-2,Vol.1,pg.5:6-8)

The Judgment improperly suggests, based upon the words "pre-Stipulation," that possibly some basis remains to claim priority based upon the Stipulation. In light of the undisputed declaration filed by the Conservation District and the rulings of the trial court, it is clear these

Purveyor Parties failed to prove any priority to Twitchell water based upon the Stipulation.

The Purveyor Parties claimed priority to Twitchell water. They had the opportunity to prove their claims of priority to Twitchell water and failed to do so. The Judgment must finally adjudicate this issue and reflect that Purveyor Parties failed to prove priority to Twitchell water on any theory.

(b) ***The Trial Court Properly Ruled That Twitchell Augmentation Is Ordinary Groundwater But Failed To Include This Finding In The Judgment.***

The water rights license held by the Federal Government is limited to temporary impoundment of the surface water. (Phase 4, Exhibit F, Page 4 of 8) Once released from the reservoir into streams and watercourses within the basin, this water is unappropriated pursuant to *Water Code* §1202(d) and is available for use by all. As ordinary stream flow, such water percolates into the groundwater basin and is ordinary groundwater subject to use by all water users in the basin.

The water rights license issued for the Project contains specific provisions preserving existing water rights and providing that the rights to the water lie with the landowners of the District and are held in trust by the governmental agencies involved in the Project to benefit the local landowners.

> Subject to the prior right of the United States ..... , [and] the satisfaction of existing water rights, ... the Santa Barbara County Water Agency, on behalf of the **Santa Maria Valley Water Conservation District and its land-owners, shall**, consistent with other terms of this permit, **have the perpetual right to use all water that becomes available** through the construction and operation of Vaquero Dam and Reservoir, which right shall be an appurtenant to land upon which the

water is applied to beneficial use. (Emphasis added.) (Phase 4, Exhibit F, Page 7 of 8)

The water rights license and state law are in harmony.

The court ruled accordingly following Phase 5, stating:

Twitchell water, once released for recharge, retains its character as native water. (Emphasis added.) (Phase 5 Decision, C.T.-1,Vol.28,pg.7143:23)

However, the trial court failed to include this important finding in the Judgment.

(c) ***Because The Judgment Incorporates The Settlement Stipulation, The Judgment Improperly Suggests That Rights To Twitchell Water Were Awarded To The Purveyor Parties Even Though The Contrary Is True.***

The trial court improperly combined the Settlement Stipulation with the Judgment After Trial. As discussed infra, the Settlement Stipulation improperly purports to divide up rights to Twitchell water among only the settling parties notwithstanding the trial court's ruling and the District's declaration to the contrary.

(d) ***The Trial Court Erred In Failing To Enter Judgment In Favor Of Appellants On The Purveyor Parties' Claims To Priority To Twitchell Water And Failed To Enter Judgment Confirming That Twitchell Water Is Ordinary Groundwater.***

The Purveyor Parties proved no priority to Twitchell water. The trial court properly ruled that Twitchell water is part of the native supply available to all water users with rights to the native supply. Accordingly, the Judgment must be amended to declare (1) that Purveyor Parties proved

no priority to Twitchell water; (2) that water released from the Twitchell reservoir is native groundwater; and (3) that Purveyor Parties failed to prove any transfer of Twitchell water rights to the stipulating parties or to any other party.

(ii) Claims of municipal priority.

Five of the Purveyor Parties – Santa Maria, Pismo, Oceano, Arroyo Grande and Grover Beach requested a priority to groundwater based on *Water Code §106* and 106.5 (C.T.-1,Vol.27,pg.7007; C.T.-1,Vol.11,pg.2946:8-10) Other than making this allegation in their declaratory relief causes of action, none of the proponents introduced any evidence, or made any argument, to prove this claim.

(iii) Claims of equitable priority.

Respondent Santa Maria claimed a groundwater priority based on a claim that ground water rights should be awarded based upon equitable priority rather than based upon common law priority. (C.T.-1,Vol.27,pg.7013) Purveyor Parties failed to prove or argue any legal or equitable basis supporting a claim for equitable apportionment of ground water.

Further, California law does not support a claim for equitable priority. *Mojave, supra, at 1233.* The trial court failed to enter judgment denying this claim as requested by Appellants.(C.T.-1,Vol.28,pg.7313:1-6)

.

(iv) Actions 'benefiting the basin' do not create a groundwater priority.

The Cities of Pismo Beach, Arroyo Grande, Grover Beach and Oceano CSD were separate parties in the underlying action. (C.T.-1,Vol.11,pg.2938) They identified themselves collectively as the "Northern

Cities" (C.T.-1,Vol.11,pg.2942:10-12). However, they were not certified as a class.

(a) ***The Court Erred In Awarding Water Rights To The Northern Cities, Because Northern Cities Was Not A Legal Entity.***

Because the 'Northern Cities' was not a legal entity nor a certified class, the 'Northern Cities' was not a party to which rights could be awarded. Nevertheless, the Judgment awards water rights to the "Northern Cities." (Judgment, C.T.-2,Vol.1,pg.4:21-22) The Judgment fails to award individual rights to any separate entity. No individual relief could be granted since no individual party presented evidence specific to that party. Failure to award Judgment to specific parties deprives Appellants of clarity in the Judgment as to which specific parties obtained rights against each appellant. This lack of clarity is likely to cause confusion in the future in the exercise of continuing jurisdiction.

(b) ***Even If The Northern Cities Was A Legal Entity, Which Is Not Conceded, The Court Erred As A Matter Of Law In Awarding The Water Rights Set Forth In The Judgment.***

The Judgment awarded the so-called northern cities a groundwater right as follows:

> The Northern Cities have a prior and paramount right to produce 7,300 acre-feet of water per year from the Northern Cities Area of the Basin. (Judgment, C.T.-2,Vol.1,pg.4:21-22)

The words "prior and paramount" improperly suggest a priority water right against all other rights everywhere in the basin whether they be pueblo, overlying, appropriative, prescriptive, or based on imports. The trial court found that the area of adjudication, including the so-called

Northern Cities Area, was one basin, a common water supply. (Phase 2 Decision, C.T.-2,Vol.1,pg.57:22-28) Accordingly, as a matter of law, all water users in the basin have a right to water in the Northern Cities Area based upon their common law priority in times of shortage. *W. Hutchins, The California Law of Water Rights* (1956) pg. 475. (See discussion below regarding exclusion of Appellants' rights to water in the northern area of the basin.)

The trial court also erred in making specific awards of water rights in the Judgment which are discussed below. The Statement of Decision for Phase 4 sets forth the various awards in acre-feet, to these various parties. Collectively, these awards total 7,300 afy and are broken down as follows:

5,200 afy Lopez Deliveries

400 afy Lopez Return Flows

300 afy Lopez Stream recharge

1,200 afy SWP Deliveries (Discussed in the section on Imported Water)

100 afy SWP Return Flows (Discussed in the section on Imported Water)

100 afy Rainwater Percolation Ponds

(Phase 4 Decision, C.T.-1,Vol.28,pg.7168:19-7169:8)

The trial court failed to identify the legal basis for these various awards and instead stated that the awards were based upon an undefined combination of common law, statutory law and contract law, stating:

> The Court finds, based on common law, statutory, and contractual principles, that the supplemental water supplies produced or salvaged by the Northern Cities and the San Luis Obispo County Flood Control and Water Conservation District by the combination of the Lopez Reservoir, State Water Project imports, percolation ponds, and return flows equals approximately 7,300 acre feet of water per year. That total is water to which the Northern Cities have a prior right,

particularly during times of overdraft, should that occur in the future. (Phase 4 Decision, C.T.-1,Vol.28,pg.7169:1-6)

Review of testimony is necessary to discern the basis for these claims. The only witness to testify to the water quantities set forth above, was Dr. Iris Priestaff. Her testimony was that certain activities—the Lopez Project, SWP imports and rainwater percolation ponds — had an effect on the basin. These activities, she testified, "benefited the basin." See Lopez Deliveries (R.T.-1,Vol.14,pg.3697:13-14; R.T.-1,Vol.14,pg.3699:8-11; R.T.-1,Vol.14,pg.3712:8-20), Lopez Return Flows (R.T.-1,Vol.14,pg.3700:1-3), Lopez Stream recharge (R.T.-1,Vol.14,pg.3701:3-4) and Rainwater Percolation Ponds (R.T.-1,Vol.14,pg.3702:28-3703:2).

No California law creates a priority groundwater right based upon conduct "benefiting a water basin

(c) *The Trial Court Erred In Awarding Water From The Lopez Reservoirr.*

(A1) *The Lopez Project.*

The Lopez Project is owned by the San Luis Obispo County Flood Control and Water Conservation District. (R.T.-1,Vol.14,pg.3670:10-12) Five entities have contract rights with SLO Flood to receive surface water from the Lopez Reservoir. (R.T.-1,Vol.14,pg.3669:20-22) However, only four entities were parties to the underlying litigation. Service Area No. 12 was absent. Additional payments came from general and special property taxes paid by citizens generally. (R.T.-1,Vol.14,pg.3688:5-22)

The Judgment provides:

> The Northern Cities have a prior and paramount right to produce 7,300 acre-feet of water per year from the Northern Cities Area of the Basin; and (b) the Non-Stipulating Parties have no overlying, appropriative, or other right to produce any water supplies in the Northern Cities Area of the Basin. (Judgment, C.T.-2,Vol.1,pg.4:21-24)

The four northern entities proved they paid for part, but not all, of the Project. Proof of payment for a project does not create a groundwater right. (See discussion above on the Twitchell Project.) There was no legal basis for the four parties styled as "Northern Cities" to claim a groundwater priority right to water from the Lopez Reservoir.

(A2) ***Judgment award of 5,200 acre feet per year.***

The 5,200 acre feet per year awarded to these Purveyor Parties from the Lopez Reservoir was **surface** water, not **groundwater**. The water is piped directly from the dam to the individual water user. (R.T.-1,Vol.14,pg.3699:12-15)

Purveyor Parties did not plead nor request any surface water rights. The State Water Resources Control Board (SWRCB) governs surface water rights. There was no testimony or evidence that the SWRCB, or any other entity, transferred water rights to the Lopez Reservoir to Purveyor Parties. To the contrary, the unrebutted evidence was that surface water rights are held by SLO Flood. (Phase 3, Exhibit D-1)

Even if all persons or entities with a right to surface water had been properly named and served, which they were not, having a right to **surface** water does not create a **groundwater** right. Finally, this water originated within the watershed and cannot create an imported groundwater right.

(A3) ***Judgment award of 400 acre feet per year.***

The trial court awarded 400 afy for return flows of Lopez Project water. However, water in the Lopez Reservoir is not imported. This water originates within the watershed. (Phase 3, Exhibit D-1) Unlike return flows of imported water, no law supports an award of rights to return flows of water originating **within** the watershed of the basin. Such water is native

surface water which becomes native groundwater once it is released and percolated into the groundwater basin by operation of *Water Code* §1202(d). (See Twitchell discussion elsewhere in this brief.) Even if such water augments or benefits the supply, no groundwater right is created.

(A4) ***Judgment award of 300 acre feet per year.***

The trial court also erred in awarding 300 acre feet per year based upon rights allegedly created by timed release of water from the Lopez Reservoir. For all of the reasons discussed in the immediately preceding sections, and in the Twitchell discussion, such flows become native groundwater.

Finally, there was a lack of indispensable parties since other water users with contractual rights to water from the Lopez Reservoir were not included as parties.

(d) ***The Trial Court Erred In Awarding 100 Acre Feet Per Year For Water Derived From Percolation Ponds.***

The trial court awarded 100 acre feet per year as a result of impounding surface water. This surface water originates **within** the watershed of the basin. (R.T.-1,Vol.14,pg.3702:12-17) Accordingly, such water is not entitled to priority as imported water. Likewise, as noted above, such water when released becomes part of the native groundwater. *Water Code* §1202(d).

Finally, the only evidence introduced concerning the percolation ponds was their location. There was no substantial evidence of ownership or who paid for the ponds

(C) **<u>The Trial Court Erred In Failing To Enter Judgment Declaring That No Claim Of Unreasonable Water Use Was Proved.</u>**

All of the Purveyor Parties except Nipomo pleaded claims alleging that Appellants were using water unreasonably. (C.T.-1,Vol.1,pg.248:12-249:12; C.T.-1,Vol.3,pg.670:3-22; C.T.-1,Vol.27,pg.7014; C.T.-1,Vol.11,pg.2947:19-2948:4)

The Purveyor Parties produced no evidence that Appellants' pumping was unreasonable. To the contrary, the unrebutted evidence, offered by the Purveyor Parties, was that **farmers in the Santa Maria Basin, including Appellants, used "very advanced irrigation practices."** (R.T.-1,Vol.9,pg.2424:12-20)

Based upon the forgoing, Appellants are entitled to Judgment denying the Purveyor Parties unreasonable water use claim.

(D) The Trial Court Erred In Failing To Enter Judgment Against Each Of The So-Called Northern Entities On All Unproved Causes Of Action.

Pismo, Arroyo Grande, Oceano and Grover Beach each pleaded claimed rights to **storage** (C.T.-1,Vol.11,pg.2946:4), **equitable restitution** (C.T.-1,Vol.11,pg.2945:20-22) and **contract rights for 43% of the safe yield** (C.T.-1,Vol.11,pg.2945:24-25). No evidence was produced by these parties that any storage space exists in the basin which is full and spilling to the ocean, as discussed in the imported water section of this Brief. No evidence was introduced to support a claim for unjust enrichment. No contractual evidence was introduced to support a claim to limit Appellants' groundwater rights. Nevertheless, as a matter of law, these parties could not contract away Appellants' groundwater rights.

The Judgment fails to enter judgment on these claims. The trial court erred in failing to enter Judgment denying these claims. Appellants request this Court order modification of the Judgment to reflect denial of the storage, equitable restitution and contract right claims.

(E) The Trial Court Erred In Failing To Declare In The Judgment That The Basin Is Not Currently In Overdraft.

All parties requested a determination whether the Basin was in overdraft. Overdraft, or the lack thereof, is a foundational issue which affects the rights of all parties to the Judgment.

Following Phase 3, the trial court ruled:

> The court therefore concludes based on all the evidence that the Basin is not, and has not been, in overdraft. This conclusion disposes of the Appropriators' prescriptive-right claims based on a condition of overdraft. (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:25-27)

No expert testimony was presented in any subsequent trial phase that the basin was currently in overdraft. Accordingly, the only evidence in the entire trial was that the basin was not in current overdraft. The Judgment, however, fails to reflect the court's finding of no current overdraft. The Judgment provides:

> The court determines that there is a reasonable likelihood that drought and overdraft conditions will occur in the Basin in the foreseeable future that will require the exercise of the court's equity powers. (C.T.-2,Vol.1,pg.5:9-11.)

Although the language in the Judgment **suggests** the court found no current overdraft, the Judgment fails to **declare** the trial court's finding of no current overdraft. Appellants request this Court order the trial court to modify the Judgment to include this finding.

(F) The Trial Court Erred In Failing To Protect Appellants' Overlying Rights Against Future Prescription And Failed To Protect The Basin During Continuing Jurisdiction.

Appellants requested that the Judgment include language protecting Appellants' against future prescription. (C.T.-7,Vol.8,pg.2154:6-2155:25)

The Judgment does not protect Appellants' rights nor does the Judgment prevent unlawful pumping of an overdrafted basin.

California courts routinely include provisions in the judgment to protect the exercise of future rights by the parties. For example, the *Burr v. Maclay Rancho Water Co.* judgment provided:

> ..... the continued pumping of said water in the future by said defendant, as herein permitted, shall not be deemed adverse to the rights of plaintiff herein declared, whether such rights are, or are not, used by plaintiff, and that defendant be forever enjoined from asserting or claiming rights in such water paramount to those of plaintiff herein declared. (*Burr v. Maclay Rancho Water Co., supra,* at 439.)

Ninety years ago, the California Supreme Court decided *San Bernardino v. Riverside* (1921) 186 Cal. 7, a groundwater case in which the supply was in surplus, as it is in this case. Nevertheless, the trial court reserved jurisdiction to protect the rights of the parties. The judgment declared that given the surplus, any pumper could use water provided such use was not wasteful. The judgment in that case **implied** that paramount rights holders would be protected. However, relying on *Burr v. Maclay Rancho Water Co.*, the California Supreme Court ruled that protection of the paramount rights holders should have been **expressed** and not merely implied. *San Bernardino v. Riverside, supra,* at 19-20.

Likewise other California courts have held:

> ..... if .....no substantial damages be proved, but a paramount or preferential right be shown, he is entitled to a judgment declaring such right and an injunction against the assertion of an adverse right based on user or lapse of time, or to compensation for the extinguishment of the paramount right ..... (*Peabody v. City of Vallejo, supra,* at 383.)

> ..... the trial court, in accordance with the mandate in the constitutional provision, should incorporate in its decree a declaration protecting [overlying and riparian rights holders]

> in the prospective reasonable beneficial uses of the waters here involved ..... (*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 530.)

As stated by the California Supreme Court in the *San Fernando*:

> In Glendale plaintiff did not seek injunctive relief because the basin contained a surplus of water over and above the amounts being beneficially used. (23 Cal.2d at pp. 78-79.) The purpose of that action was not to protect rights in water already being used – there then being enough water for all – but to preserve a potential right to water that would be required for plaintiff's future needs. (23 Cal.2d at pp. 74-75.) Plaintiff was following the procedure appropriate for protecting such a potential right against prescriptive claims by appropriators. Speaking of the riparian owner's right to future reasonable beneficial uses, this court said in *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 525 [45 P.2d 972]: "As to such future or prospective reasonable beneficial uses, it is quite obvious that the quantity of water so required for such uses cannot be fixed in amount until the need for such use arises. Therefore, as to such uses, **the trial court, in its findings and judgment, should declare such prospective uses paramount to any right of the appropriator. By such declaratory judgment, the rights of the riparian will be fully protected against the appropriative use ripening into a right by prescription,** but, until the riparian needs the water, the appropriator may use it, thus, at all times, putting all of the available water to beneficial uses. (*Id.* at 268 (Emphasis added.))

Accordingly, Appellants are entitled to injunctive declarations in the Judgment protecting their groundwater rights against future prescription and protecting the supply.

The trial court clearly intended to protect Appellants' rights under continuing jurisdiction stating.

> And I think the other issue that the court has to deal with here is how to embody those facts in a judgment that protects the rights of all the parties here. (R.T.-1,Vol.44,pg.8001:6-9)

However, the Judgment failed to include express protective declarations stating:

> Each and every Party, their officers, agents, employees, successors and assigns, are enjoined and restrained from exercising the rights and obligations provided through this Judgment in a manner inconsistent with the express provisions of this Judgment. (Judgment After Trial, C.T.-2,Vol.1,pg.6:23-25)

Although protection of the overlying right may be implied, this declaration falls short of specific protective declarations as required by *San Bernardino v. Riverside* protecting Appellants from prescription and protecting the basin from pumping without right when there is no surplus.

Appellants request this Court order modification of the Judgment to include express provisions protecting the priority of Appellants' overlying rights against prescription and protecting the Basin from pumping in excess of the safe yield as defined by *San Fernando*.

(G) <u>The Trial Court Erred In Declaring That Appellants Have No Water Rights In The Northern Cities Area.</u>

(1) The Trial Court Ruled That The Santa Maria Basin Is A Single Hydrogeologic Unit Which Includes The Northern Cities Area

In Phase 2, some parties attempted to show that the northern area of the basin, the so-called "Northern Cities Area," was actually a separate basin and if not a separate basin, should be managed separately. The trial court disagreed ruling:

> The Northern Cities Area is also shown on the map which is attached as Exhibit 5 to the Declaration of Wagner. That area shall remain within the Basin and Boundary Line fixed in this Order. (Phase 2 Decision, C.T.-2,Vol.1,pg.57:7-9)

> The Court finds that there is no substantial controversy that the Northern Cities Area, the Nipomo Mesa and the Santa

> Maria Valley area **all overlie one large groundwater basin.** (Emphasis added.) (Phase 2 Decision, C.T.-2,Vol.1,pg.57:24-25)

Following Phase 3, the trial court again confirmed that the Santa Maria Basin constituted one basin, one water source, ruling:

> The court finds that these Appropriators did not establish by credible evidence, under any standard of proof, that sub-basins or sub-areas were in a condition of overdraft. The court does affirm its previous finding that **the Basin is a single hydrogeologic unit** for purposes of the determinations of overdraft in this phase of the case. (Emphasis added.) (Phase 3 Decision, C.T.-1,Vol.17,pg.4422:9-12)

(2) The Trial Court Erred In Failing To Attach A Copy Of The Basin And Boundary Line Fixed By The Court As A Freestanding Exhibit To The Judgment After Trial.

The Judgment After Trial identifies various exhibits. The "Phase 2 Order" (Phase 2 Decision, C.T.-2,Vol.1,pg.55), which includes the Basin and Boundary Line fixed by the trial court and documented on a map, are not attached as a freestanding exhibit to the Judgment. Instead, the trial court simply attached the Settlement Stipulation as Exhibit 1 to the Judgment After Trial. (C.T.-2,Vol.1,pg.55) The Settlement Stipulation includes as Exhibit 1b therein, a copy of the Basin and Boundary Line map. (Phase 2 Decision, C.T.-2,Vol.1,pg.59)

As discussed below, Appellants contend that combining the Judgment After Trial with the Stipulation was error. In any event, the Judgment After Trial must be freestanding and enforceable on its own terms as between the litigating parties. Accordingly, the Basin and Boundary Line Map and the explanatory Phase 2 Order must be attached as a freestanding exhibit to the Judgment After Trial to assure that the basin and adjudication area are clearly identified for continuing jurisdiction.

(3) Appellants Are Overlying Landowners And As Such Have A Common Law Right To Pump Groundwater From The Entire Water Basin.

The Judgment declares that Appellants have no rights in 'The Northern Cities Area of The Basin stating:

> ..... the Non-Stipulating Parties have no overlying, appropriative, or other right to produce any water supplies in the Northern Cities Area of the Basin. (Judgment, C.T.-2,Vol.1,pg.4:23-24)

It is well recognized that landowners overlying a common water supply in a single water basin have usufructuary correlative rights to the use water in that basin regardless of the point from which the water is extracted. *W. Hutchins, The California Law of Water Rights* (1956) pg. 475. There was no legal basis to limit Appellants' water rights to only a part of the entire water basin.

(4) Excluding Appellants Water Rights In The So Called Northern Cities Area Is Unconstitutional.

Depriving Appellants of water rights in the so-called Northern Cities Area deprives Appellants of equal protection. *California Constitution, Article I, Section 7.* The Judgment treats overlying landowners in the Northern Cities area, which overlies the same water basin as Appellant overlying landowners, differently by providing Northern Cities area landowners water rights to this groundwater while at the same time denying Appellant landowners' rights to this water. Such an exclusion also is inconsistent with the maximum use requirements of the *California Constitution*, Article X, Section 2. Finally, such an exclusion of Appellants' water rights in the Northern Cities area also results in an unconstitutional restraint on liberty by preventing them from acquiring and

pumping groundwater upon land they may acquire in the future in or around the Northern Cities area.

JUDGMENT AND PHYSICAL SOLUTION ERRORS

(A) Introduction To Judgment Errors Regarding Settlement Stipulation And Physical Solution

Following the Phase 3 trial, all of the Purveyor Parties and many of the Overlying Landowners entered into the Settlement Stipulation. (C.T.-2,Vol.1,pg.10) The Settlement Stipulation gave stipulating parties contractual rights substantially different from those afforded under the common law. Appellants were unwilling to give up common law rights and accordingly did not enter into the Settlement Stipulation.

The Purveyor Parties requested that the trial court impose the Settlement Stipulation, which included a so called physical solution, on Appellants. (R.T.-1,Vol.40,pg.7467:15-23; R.T.-1,Vol.42,pg.7785:2-5; R.T.-1,Vol.42,pg.7785:20-22)

The Purveyor Parties were provided the opportunity in the Phase 5 trial to request and prove the basis for a physical solution. As the court stated:

> I want ... talk about scheduling the last phase of the trial, Phase 5 ... you have indicated that the **focus of that phase will be to get the Court to make an adjudication for a physical solution.** And we know that because of your negotiations and your stipulation that you have essentially agreed that the **stipulation sets forth a physical solution you would like to see imposed on everybody** within the valley, every party to this action. And it seems to me **that that may require some testimony from somebody.** (Judge Komar's comments on final day of Phase 4 trial.) (Emphasis added.) (R.T.-1,Vol.40,pg.7467:10-23)

Following the Phase 5 trial, over objection of Appellants, the trial court reduced the Settlement Stipulation to a Judgment and combined the Settlement Stipulation with Appellants' Judgment after court trial.

(Judgment, C.T.-2,Vol.1,pg.2:1-5) The trial court labeled the combined judgments as "Judgment After Trial" and characterized the document as a "declaratory judgment and physical solution." (Judgment, C.T.-2,Vol.1,pg.4:6-7) The trial court wholly incorporated the Settlement Stipulation, which contained therein a so-called physical solution created by the Settling Parties, into the Judgment After Trial.

The trial court "independently adopted" and bound Appellants to certain portions of the Settlement Stipulation. (Judgment, C.T.-2,Vol.1,pg.4:25-5:5) Following entry of the Judgment, Appellants filed this Appeal. Thereafter, the Purveyor Parties moved forward with the Groundwater Monitoring Provisions and Management Area Monitoring Programs contained in the Settlement Stipulation by filing documents with the court, retaining experts and requesting court approval of various activities in this process. Appellants objected in the trial court to the Purveyor Parties proceeding post-trial with the Groundwater Monitoring Provisions and Management Area Monitoring Programs contained in the Settlement Stipulation based upon the appeal and automatic stay as a result thereof. (C.T.-6,Vol.1,pg.144:16-17)

Appellants filed a Writ requesting that this Court enforce the automatic stay to stop the Purveyor Parties from proceeding with the Monitoring and Management Programs. In opposition to the Writ, **the Purveyor Parties admitted that the Settlement Stipulation,** including the groundwater monitoring provisions and management area monitoring programs contained therein, **do not apply to, nor bind Appellants**. (Writ Opposition, pg.5) Accordingly, this Court denied the Writ.

Although **the Purveyor Parties and the trial court have taken the position that the Monitoring and Management provisions of the Settlement Stipulation do not bind Appellants, the Judgment still provides that Appellants are bound** by these provisions. Accordingly,

Appellants request that this Court order modification of the Judgment to clarify that Appellants are not bound in any way by the Settlement Stipulation and or the Groundwater Monitoring Provisions and Management Area Monitoring Programs contained therein.

Over Appellants' objection, the trial court "independently adopted" the Settlement Stipulation as a physical solution.

In the following sections, Appellants will demonstrate that the trial court committed error by:

- Converting The Settlement Stipulation To A Judgment.
- Combining The Settlement Stipulation Entered Into By The Settling Parties With The Judgment Of The Non-Settling Parties.
- Entering Judgment Ordering A Physical Solution And Binding Appellants To The "Groundwater Monitoring Provisions And The Management Monitoring Programs Contained In The Stipulation" Or Any Other Terms Or Definitions Thereof.
- Post-trial Approval of Groundwater Monitoring Provisions And Management Area Monitoring Programs.

(B) <u>The Trial Court Erred In Converting The Settlement Stipulation To A Judgment.</u>

(1) The Trial Court Erred In Reducing The Settlement Stipulation To A Judgment In The Absence Of A Duly Noticed Motion Pursuant To *Code of Civil Procedure* §664.6.

In order to resolve uncertainties in settlement agreements and their enforcement, the California Legislature enacted *Code of Civil Procedure* §664.6, which provides as follows:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, **upon motion**, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. (emphasis added)

Following the Phase 3 Trial, the Purveyor Parties, along with many overlying landowners, entered into the Settlement Stipulation. Appellants and the Wineman Parties did not enter into the agreement. Appellants and the Wineman Parties continued to litigate the action herein through the 4th and 5th Phases of Trial to preserve their common law rights.

The Settlement Stipulation provided by its terms that it would be reduced to a Judgment. (Settlement Stipulation, C.T.-2,Vol.1,pg.14:2-3) However, none of the Settling Parties ever filed a motion to have the Settlement Stipulation reduced to a Judgment pursuant to *Code of Civil Procedure* §664.6. Instead, the trial court, over objection of Appellants, entered the Settlement Stipulation as a Judgment advising that Stipulating Parties could object if they were so inclined. (R.T.-1,Vol.46,pg.8072:3-9) No formal objection was filed by any of the Settling Parties.

The underlying purpose of *Code of Civil Procedure* §664.6 is to remove uncertainty and enforceability problems from settlement agreements. Section 664.6 requires a motion to reduce a settlement agreement to judgment. The motion process puts all parties on notice of the precise terms of the settlement, ferrets out potentially confusing provisions, allows the court to review the legality and appropriateness of the provisions

of the settlement and allows all parties to be bound or affected by the settlement, to object.

By simply assuming that all parties agreed to the Settlement Stipulation and all of its terms, and forgoing the motion requirements of *Code of Civil Procedure* §664.6, the goals of the statute were lost. As a result, the Settlement Stipulation, which is unclear, contrary to law, against public policy and unjust, as discussed infra, was reduced to Judgment with insufficient review and consideration.

(2) Public Entities And Private Parties May Enter Agreements To Monitor And Manage A Water Supply, However, They May Not Impose Their Agreement On Parties Which Do Not Agree To Be Bound Thereby And Such An Agreement Must Not Impair The Rights Of Non-Signatories And May Not Avoid The Law Or Endanger The Supply.

Public entities clearly have a duty to protect public resources. Private entities and individuals also may properly be involved in projects to protect the environment. The Settlement Stipulation entered into by the Settling Parties is laudable as an attempt to monitor and protect the water supply in the Santa Maria Basin. Any number of agreements to protect public resources are entered into on a regular basis. What makes the Settlement Stipulation problematic is that it is not structured to monitor and control groundwater pumping based upon safe yield and overdraft as articulated by the California Supreme Court.

Appellants litigated their dispute with the Purveyor Parties through trial to preserve their common law rights. The Settlement Stipulation conflicts with Appellants' common law rights and creates two different rule books for dealing with water shortage in the same groundwater basin. Combining the Settlement Stipulation with the Appellants' Judgment after

trial compounds the problem. Binding Appellants to the terms of the Settlement Stipulation deprives Appellants of the common law rights they litigated to preserve and is improper based upon the California Supreme Court's holding in *Mojave*.

(3) The Trial Court Erred In Reducing The Settlement Stipulation To Judgment Because The Settlement Stipulation Is Contrary To Law, Against Public Policy and Unjust.

(i) Introduction.

Controlling case law properly recognizes a settlement agreement as a contract which is governed by normal legal and statutory requirements. However, a court may not reduce a settlement agreement to judgment which is illegal, contrary to public policy or unjust. As the court explained in *Timney v. Lin* (2003) 106 Cal. App. 4th 1121:

> Both our Supreme Court and the Sixth Appellate District have ruled, in related contexts, that **section 664.6 does not allow a court to endorse or enforce a provision in a settlement agreement or stipulation which is illegal, contrary to public policy, or unjust.**
>
> Under section 664.6, the court may reject provisions of a settlement as unjust or against public policy]; accord,
>
> Consequently, even though there is a strong public policy favoring the settlement of litigation, this policy does not excuse a contractual clause that is otherwise illegal or unjust. *(Id.* at 1127. (Citations omitted.) (Emphasis added.)

Therefore, even if a motion had properly been made pursuant to *Code of Civil Procedure* §664.6, the Settlement Stipulation reduced to Judgment by the trial court, is inconsistent with the law, against public policy and unjust.

(ii) Exportation of groundwater during a time of shortage permitted by the Settlement Stipulation is contrary to the common law.

The Settlement Stipulation authorizes exports of groundwater even during a time of shortage. This is inconsistent with the common law rule that exports, as appropriations, can be curtailed in the event of overdraft. *Burr v. Maclay Rancho Water Co., supra,* at 436. Reducing the Settlement Stipulation to Judgment with this provision included, clearly is against public policy, since water which could not be exported from an overdrafted basin based upon the common law, could be exported under the Stipulation. Allowing exports during overdraft would conflict with the common law rights of Appellants to have water curtailed in time of overdraft and would be contrary to the important public policy of protecting the water basin.

(iii) The Settlement Stipulation allows continued groundwater pumping during overdraft.

As discussed above, overdraft has a specific legal meaning set forth in case law. Overdraft is triggered by pumping in excess of the safe yield. The Settlement Stipulation does not adopt the common law overdraft standard. Instead, the Settlement Stipulation allows pumping reductions only when the basin is a condition defined as "severe water shortage." (Settlement Stipulation, C.T.-2,Vol.1,pg.18:3-5) As discussed previously, the definition of "severe water shortage," is less stringent than the overdraft standard set forth in the common law.

For the Santa Maria Valley management Area, the 'trigger point' is defined as follows:

> Severe Water Shortage Conditions shall be found to exist when the Management Area Engineer, based on the results of the ongoing Monitoring Program, finds the following:
>
> 1) groundwater levels in the Management Area are in a

condition of chronic decline over a period **of not less than five Years;**

2) the groundwater decline has **not been caused by drought**;

3) there has been a **material increase in Groundwater use** during the five-Year period; and

4) monitoring wells indicate that groundwater levels in the Santa Maria Valley Management Area are **below the lowest recorded levels**. (Settlement Stipulation, C.T.-2,Vol.1,pg.29:9-15)

These provisions do not set forth the common law standard. Under the common law, there is no need to wait five years to enjoin pumping in excess of the safe yield. In fact, to protect against prescription an action must be brought before five years elapse. The common law also does not have a 'drought exception.' Under the common law, overdraft triggers a right of action to protect the supply—drought or no drought. Likewise the common law does not link protection of the basin to an increase in demand. Under the common law, a court can protect the water supply regardless of whether the overdraft results from changes in supply, for example, long term drought, or because of an increase in demand. By contrast, the trigger point to reduce pumping in the Settlement Stipulation requires water shortage only caused by increased demand.

Finally, pursuant to the common law, a water user with a priority right may enjoin pumping before groundwater levels are **below the lowest recorded levels** as required by the Settlement Stipulation. In the context of the Santa Maria Basin this provision could be extremely damaging to the water basin. Groundwater in the basin holds back seawater intrusion. Lowest recorded groundwater levels may not be sufficient during changing and long term conditions to effectively repel seawater intrusion.

The common law safe yield concept takes into consideration all factors in determining the amount of water which can safely be pumped from a groundwater basin. The severe water shortage definition created by adverse parties in the Stipulation clearly is not the common law standard and will allow pumping in excess of the safe yield posing a major danger to the water basin and impairing Appellants' common law overlying priority groundwater rights.

The foregoing discussion examines the 'trigger points' for the so-called Santa Maria Management Area. The corresponding standards for the other two 'management areas' are similar and are set by committees made up of the Settling Parties, including the Purveyor Parties, who were adverse to Appellants in the underlying litigation. Accordingly, the trigger points used by these entities also are not based upon the common law and can be changed by these adverse parties in their discretion. The common law standard for overdraft and priority rights cannot be changed by the parties and is necessary to protect the basin and the rights of all parties under continuing jurisdiction.

(iv) The Settlement Stipulation allows pumping during overdraft regardless of common law pumping priority.

California groundwater law carefully details a groundwater priority system designed to limit water use based upon priorities to prevent overdrafting and damaging a water basin. Allowing groundwater users to continue to pump ground water during a time of overdraft regardless of pumping priority, endangers the water resource and therefore is against public policy.

(v) The Settlement Stipulation reduced to Judgment by the trial court improperly states that it is consistent with the common law.

The Settlement Stipulation incorrectly and misleadingly states that its provisions are consistent with the common law, providing as follows:

> The terms and conditions of this Stipulation set forth a physical solution concerning Groundwater, SWP Water and Storage Space, consistent with common law water rights priorities. (Settlement Stipulation, C.T.-2,Vol.1,pg.19:26-27)
>
> This physical solution is a fair and equitable basis for the allocation of water rights in the Basin ..... a remedy that gives due consideration to applicable common law rights and priorities to use Groundwater and Storage Space, without substantially impairing any such right. (Settlement Stipulation, C.T.-2,Vol.1,pg.21:13-17)

(vi) Definitions in the Settlement Stipulation are not consistent with the common law.

The Settlement Stipulation includes many definitions. The definitions section of the Settlement Stipulation redefines words and phrases that have well understood legal meanings in the common law and redefines these words in a manner inconsistent with the common law. Because of this divergence in meaning, substantive provisions of the Settlement Stipulation appear to be consistent with the common law, but are in fact, different from and incompatible with the common law. Some examples of incorrect definitions are set forth below.

- **Native Groundwater**

  Stipulation Definition: *Native Groundwater* – Groundwater within the Basin, not derived from human intervention, that replenishes the Basin through precipitation, stream channel infiltration, tributary runoff, or other natural processes. (Settlement Stipulation, C.T.-2,Vol.1,pg.16:21-23)

  Common Law Definition: All percolating water in a groundwater basin except return flows of water imported from outside the

watershed of the basin. (See discussion of Imported Water Rights, *supra.*)

125

Comment: The Settling Parties have taken a term with a settled common law definition and used the term in an entirely different way. The presence or absence of 'human intervention' has nothing to do with native water as defined in the common law. Introducing the 'human intervention' element creates an entirely new class of water rights which is not authorized by the common law.

- **Overlying Right**

Stipulation Definition: *Overlying Right* – The appurtenant right of an Overlying Owner to use Native Groundwater for overlying, reasonable and beneficial use. (Settlement Stipulation, C.T.-2,Vol.1,pg.17:16-17)

Common Law Definition: The appurtenant right of an overlying landowner to use groundwater originating in the watershed of the basin on land overlying the basin for reasonable and beneficial use. (See discussion of Overlying Rights, *supra.*)

Comment: Because the Stipulation definition of native groundwater excludes groundwater 'derived from human intervention", under the Stipulation, the right of an overlying owner would not extend to water derived from human intervention, *e.g.*, return flow from a reservoir or percolation pond. Such waters are groundwater pursuant to the common law. Accordingly, the overlying right under the Stipulation is greatly reduced compared to the common law.

- **Overlying Owner**

Stipulation Definition: *Overlying Owner(s)* - Owners of land overlying the Basin who hold an Overlying Right. (Settlement Stipulation, C.T.-2,Vol.1,pg.17:18-19)

Common Law Definition: Owners of land overlying the Basin

Comment: The definition is incorrect in that it implies that some owners of land overlying the basin may *not* hold overlying rights.

- **Developed Water**

Stipulation Definition: *Developed Water* – Groundwater derived from human intervention as of the date of this Stipulation, which shall be limited to Twitchell Yield, Lopez Water, Return Flows, and recharge resulting from storm water percolation ponds. (Settlement Stipulation, C.T.-2,Vol.1,pg.15:21-23)

Common Law Definition: Under the common law, 'developed water' is 'water imported from outside the watershed.' (See discussion of Imported Water Rights, *supra*.)

Comment: The Settling Parties have taken a term with a settled common law definition and used the term in an entirely different way. Human intervention is not what distinguishes native water from developed water. The distinction is whether the water derives from outside the watershed. If so, the water is developed water. If not, such water is native water. Under the common law, water from a reservoir within the watershed such as Twitchell and Lopez, along with water from storm runoff and percolation ponds, is native water, not developed water.

- **New Developed Water**

  Stipulation Definition: *New Developed Water* – Groundwater derived from human intervention through programs or projects implemented after the date of this Stipulation. (Settlement Stipulation, C.T.-2,Vol.1,pg.16:24-25)

  Common Law Definition: The common law does not recognize a groundwater right defined as "new developed water."

  Comment: Under the common law, groundwater derived from inside the watershed, is ordinary native groundwater, regardless of human intervention.

- **Appropriative Rights**

  Stipulation Definition: *Appropriative Rights* – The right to use surplus Native Groundwater for reasonable and beneficial use. (Settlement Stipulation, C.T.-2,Vol.1,pg.15:14-15)

  Common Law Definition: The appropriative right creates pumping rights to all surplus groundwater whether native or imported. (See discussion of Appropriative Rights, *supra.*)

  Comment: As discussed elsewhere, appropriative rights allow pumping of surplus imported water when the importer does not use the return flows of the imported water. The definition in the Stipulation precludes anyone but the importer from pumping surplus return flows of imported water.

- **Definition of Imported Water**

  Stipulation Definition: *Imported Water* – Water within the Basin, originating outside the Basin that absent human intervention would not recharge or be used in the Basin. (Settlement Stipulation, C.T.-2,Vol.1,pg.16:1-2)

  Common Law Definition: Water imported into the Basin from outside the **watershed** of the Basin. (See discussion of Imported Water Rights, *supra.*)

  Comment: Based upon the definitions in the Stipulation, someone could divert a stream just outside the basin boundary, but within the watershed, and pipe the water a short distance into the basin and then allow the water to percolate and become groundwater and by doing so, create a groundwater not authorized by the common law. Such a 'project' is precluded by the common law definition limiting imports to water which derives from outside the **watershed** of the basin. The Purveyor Parties created this non common law definition in an attempt to unlawfully take water from the Twitchell and Lopez reservoirs which would fit within the non common law definition they created in the Stipulation.

- **Definition Of Lopez Water**

  Stipulation Definition: *Lopez Water* - Groundwater within the Basin derived from the operation of the Lopez Project. (Settlement Stipulation, C.T.-2,Vol.1,pg.16)

  Common Law Definition: No comparable definition exists but see Imported Water definition discussed above.

Comment: In the same way that water derived from the Twitchell reservoir is groundwater, water derived from the Lopez reservoir is ordinary native groundwater. (See Twitchell discussion.)

- **Party And Public Hearing**

  Stipulation Definition: *Party* - Each Person in this consolidated action, whether a Stipulating Party or a non-Stipulating Party. (Settlement Stipulation, C.T.-2,Vol.1,pg.17:20-21)

  Comment: The Stipulation describes non stipulating parties as "Parties" to the Stipulation suggesting that they are somehow bound or affected by the Stipulation which they did not sign.

  Stipulation Definition: *Public Hearing* - A hearing after notice to all Parties and to any other person legally entitled to notice. (Settlement Stipulation, C.T.-2,Vol.1,pg.17:24-25)

  Comment: The Stipulation definition of "Parties" and the procedure for public hearing improperly suggests that the trial court bound Appellants to the public hearing provisions of the Stipulation

(vii) Substantive provisions of the Settlement Stipulation are incompatible with the common law.

(a) ***Rights Of The Parties.***

Because of the definitions, substantive provisions of the Settlement Stipulation that seem to be consistent with the common law, in fact are not consistent with the common law. For example, the Settlement Stipulation defines the overlying right in a way that seems to be consistent with the common law definition. However, because the definition of 'Overlying

Right' includes the unlawful definition of 'Native Water,' it is apparent that overlying rights under the Settlement Stipulation are narrower and inconsistent with such rights under the common law. In contrast to the common law, pursuant to the Settlement Stipulation, any water resulting from 'human intervention' is not available to overlying pumping.

(b) *Protecting The Supply.*

The groundwater monitoring and management programs in the Settlement Stipulation, as discussed above, are less protective of overlying rights and less protective of the groundwater basin. Continued pumping in excess of common law safe yield is unlawfully allowed under the Stipulation.

(c) *Return Flows Of Imported Water.*

The Stipulation gives importing entities a groundwater right equal to a perpetually fixed percentage of their imports regardless of whether such importation results in a net augmentation of the supply. (Settlement Stipulation, C.T.-2,Vol.1,pg.26:15-18) This is contrary to the rule that the return flow recovery right, if such a right exists in these circumstances, requires proof of net augmentation of the supply.

(viii) Testimony confirming the abundance of water available in the Santa Maria Basin, and that Appellants will have enough water notwithstanding the Settlement Stipulation, does not make it appropriate to enter the Settlement Stipulation as a Judgment.

The Settlement Stipulation was never introduced as evidence or properly litigated as a physical solution In the Phase 5 trial, the Purveyor Parties presented testimony from expert Robert Beeby purporting to show that the Settlement Stipulation would not impair Appellants' ability to pump groundwater. Mr. Beeby admitted he did not analyze groundwater

levels with and without the Settlement Stipulation in place. (R.T.-1,Vol.42,pg.7882:17-25) His conclusion that Appellants' ability to pump groundwater would not be impaired was based upon his conclusion that there is no shortage of groundwater in the Santa Maria Basin.

Mr. Beeby did not testify that there was an overdraft in the supply. To the contrary, he testified there is an abundance of groundwater in the Basin. He explained there is enough water in the groundwater basin to last 15 years, even with pumping at projected 2,030 levels, and without any rainfall or other replenishment of the supply. He also confirmed there has never been a time in recorded history when there was no replenishment of the Basin. (R.T.-1,Vol.42,pg.7864:23-7865:5) This undisputed testimony, clearly demonstrates there was no overdraft to be corrected, and hence no legal basis to impose a physical solution.

Whether or not the Settlement Stipulation would impair the ability of Appellants to pump groundwater is irrelevant. A settlement agreement setting forth monitoring and management plans cannot change common law requirements to monitor the supply based upon overdraft and safe yield and cannot change common law requirements to enforce pumping restrictions based upon the California priority system.

Impairment of senior water rights is irrelevant unless there is a basis for a physical solution in which case the proponents of a physical solution have the burden of proof to show that the rights of senior rights holders will not be impaired. *Mojave, supra,* at 1250. Nevertheless, a physical solution must be based upon the common law. As discussed herein at length, the monitoring and management plan set forth in the Settlement Stipulation is inconsistent with the common law and may not properly be entered as a Judgment.

(ix) The Settlement Stipulation deprives Appellants of due process of law.

The Settlement Stipulation provides in numerous places that only Stipulating Parties have a right to be fully involved in the creation and administration of the groundwater monitoring and management plans set forth in the Settlement Stipulation. (Settlement Stipulation, C.T.-2,Vol.1,pg.10-48) The Judgment provides that Appellants are bound by these programs. (Judgment, C.T.-2,Vol.1,pg.4:25-5:5) Parties may by contract give up their due process rights. However, parties may not by contract deprive other parties, who did not enter into the contract, of their constitutional due process rights of notice and opportunity to be heard.

Additionally, whether or not Appellants are bound by the Settlement Stipulation, the management and monitoring plans implemented therein, globally affect the standards and procedures that will be employed to monitor and protect the groundwater basin. These plans will affect the quantity and quality of groundwater by endangering the integrity of the groundwater basin. These plans are being implemented in the ground water basin where Appellants hold overlying rights, without any Appellant control over the process. These programs are being created and controlled by parties which were adverse to Appellants in the underlying action. As such, Appellants are being deprived of due process of law.

(x) The Settlement Stipulation requires improper expenditure of public resources to oversee a private contract.

It is the function of the court system to resolve disputes, not oversee contracts. The Stipulation improperly requires the trial court to review and approve numerous actions by the Settling Parties pursuant to the Settlement Stipulation. Approval of unlitigated matters related to the Stipulation, is purely administrative in nature, but improperly suggests that such matters were litigated. The trial court's role must be limited to adjudicating

disputes between the Stipulating Parties inter se and between the Stipulating Parties and Appellants.

(xi) The Settlement Stipulation wrongfully usurps and improperly limits the jurisdiction of the trial court.

The Settlement Stipulation improperly dictates what the court is required to do and what the court is prohibited from doing. For example, the trial court is required to administer the use of underground storage space except under certain circumstances where the trial court may not become involved. (Settlement Stipulation, C.T.-2,Vol.1,pg.20:21-25) The trial court is required to 'consider' some aspects of the Stipulation but prohibited from considering other parts of the Stipulation. The Agreement, however, is silent as to what 'consider' means. (Settlement Stipulation, C.T.-2,Vol.1,pg.43:13-19)

The Stipulation prohibits the trial court from making adjustments to the Stipulated Judgment.

> Nothing in the Court's reserved jurisdiction shall authorize modification, cancellation or amendment of the rights provided under Paragraphs III; V(A, E); VI(A, B, D); VII(2, 3); VIII(A); IX(A, C); and X(A, D) of this Stipulation. (Settlement Stipulation, C.T.-2,Vol.1,pg.43:3-6)

The Settlement Stipulation also creates rules of procedure the Superior Court must follow thereby depriving Appellants of procedural due process required by the California *Code of Civil Procedure.* (C.T.-2,Vol.1,pg.44:1-7) The Stipulation also dictates the standard of review the trial court must employ. (Settlement Stipulation, C.T.-2,Vol.1,pg.34:8-11)

The surrender of jurisdiction and control in this case is particularly problematic and unlawful because of the combined Judgment discussed Infra. The court must maintain complete and unlimited jurisdiction to properly enforce the Judgment under continuing jurisdiction

(xii) The involvement of the trial court in the administration and approval of the Settlement Stipulation places the trial court in a judicial conflict of interest with Appellants who settled their disputes by trial.

The Settling Parties' rights inter se are determined by the Settlement Stipulation. The non-settling Appellants' rights are quite different and determined by the common law. Enforcing pumping rights as set forth in the Settlement Stipulation will result in the water basin being overdrafted to the detriment of Appellants. Enforcing Appellants' common law rights will be inconsistent with the Settling Parties' rights as set forth in the Settlement Stipulation. Accordingly, the trial court is in a position of being unable to fairly enforce both the Settlement Stipulation and Appellants' Judgment After Trial, and accordingly is in a judicial conflict.

Additionally, the trial court is likely to favor the Settlement Stipulation process which it is administering. A trial judge must avoid even the appearance of impropriety. (*California Code of Judicial Ethics*, Canon 2) Accordingly, the trial court must limit its post-trial involvement to enforcing the Judgment based upon the common law.

(xiii) The Settlement Stipulation provides adverse parties with power over a public resource.

The Settlement Stipulation provides only the Settling Parties with rights to water from the Twitchell Reservoir. Enforcing a contract which takes public property and provides it to private parties and/or to limited members of the public, is against public policy. This problem is discussed in the Opening Brief of the Wineman Parties and is hereby incorporated in full as if set forth herein. Appellants request the Court take judicial notice of the Opening Brief of the Wineman Parties for this purpose.

(xiv) Approval of actions pursuant to the Settlement Stipulation improperly avoids litigation of water basin issues.

The court approval of actions pursuant to the Settlement Stipulation improperly suggests that the trial court litigated hydrogeologic and environmental issues related to the Settlement Stipulation and the so-called physical solution. A court may litigate and enforce a physical solution judgment determining such issues. (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471). However, simply approving the actions of adverse parties in the absence of an evidentiary hearing on such issues improperly suggests that the Settlement Stipulation and post-trial actions related thereto were litigated. As discussed infra, the trial court did not litigate a physical solution and did not litigate any post-trial approval of actions by the adverse parties pursuant to the Settlement Stipulation. This process avoids proper litigation of water basin issues.

(xv) The Judgment After Trial unlawfully allows only Settling Parties to be released from the Settlement Stipulation and Judgment.

The Settlement Stipulation contains a provision that allows Settling Parties only to be released from the Settlement Stipulation and the Judgment After Trial under certain conditions.

> .....any order which invalidates, voids, deems unenforceable, or materially alters those Paragraphs enumerated in Paragraph IX(A) or any of them, shall render the entirety of the Stipulation and the judgment entered based on this Stipulation voidable and unenforceable, as to any Stipulating Party who files and serves a motion to be released from the Stipulation and the judgment based upon the Stipulation within sixty days of entry of that order, and whose motion is granted upon a showing of good cause.
> (Settlement Stipulation, C.T.-2,Vol.1,pg.44:23-27)

Protecting the rights of both stipulating parties and non stipulating parties requires that all parties remain bound by the Judgment under continuing jurisdiction. Allowing some parties to be released from the Judgment is contrary to the rule that judgments must be final. *Sullivan v. Delta Airlines, Inc.* (1997) 15 Cal.4th 288, 304. Allowing parties to be released from the Judgment will deprive Appellants of the ability to have their groundwater rights enforced and protected by the court in violation of the law and public policy. Finally, allowing only stipulating parties to be released from the Judgment on motion improperly treats parties to the Judgment differently.

(C) <u>The Trial Court Erred In Combining The Settlement Stipulation With The Judgment After Trial.</u>

(1) The Settlement Stipulation Is Inconsistent From A Legal And Practical Standpoint With Appellants' Common Law Rights Which The Court Is Required To Enforce Under Continuing Jurisdiction.

As discussed in the preceding section, the Settlement Stipulation is inconsistent from a legal and practical standpoint with Appellants' common law rights. The Settlement Stipulation is founded upon terms and definitions created and agreed to by adverse parties. Among other things, the Settlement Stipulation unlawfully gives away common law rights to Twitchell Reservoir, fails to protect Appellants common law groundwater rights by providing for cutbacks based upon the common law overdraft standard and, by allowing continued pumping even when common law overdraft conditions exist, fails to protect the water supply.

(2) The Trial Court Erred In Failing To Make Clear That The Groundwater Monitoring Provisions And Management Area Monitoring Programs Created By The Settlement Stipulation Do Not Bind Appellants.

(i) The Settlement Stipulation cannot bind Appellants.

The California Supreme Court recently addressed the issue of whether a settlement agreement entered into by some litigants could be imposed on litigants which did not sign the settlement agreement. See generally, *Mojave*. The trial court ruled consistently with the *Mojave* decision. As the trial court noted:

> .....Whatever the agreement the Stipulated Parties have between themselves cannot bind or have any direct impact on the Non-Stipulated Parties.....
> (R.T.-1,Vol.46,pg.8037:20-24)

The Settlement Stipulation was not signed by Appellants. Accordingly, Appellants cannot be bound by its terms.

(ii) The Purveyor Parties admit that the Groundwater Monitoring Provisions and Management Area Monitoring Programs do not bind Appellants.

The Purveyor Parties admit, in connection with Appellants Petition for Writ of Supersedeas (Writ Petition), that the Groundwater Monitoring Provisions and Management Area Monitoring Programs do not bind Appellants. In support of their claim that the Writ should be denied, the Purveyor Parties admitted:

> Further, the stipulation about which Petitioners complain and which is incorporated in the Judgment entered herein does not require Petitioners to pay any sum whatsoever as a contribution to Basin preservation or for any other purpose. Petitioners are not parties to that stipulation. **Nor does that stipulated portion of the Judgment impede any Petitioners' ability to produce water from the Basin.** (Writ Opposition, pg 1)

> **Petitioners are not parties to the stipulation and have no obligation there under except potentially to provide data concerning their water production** to the three technical committees for use in the monitoring of Basin conditions.

> **They cannot be assessed and their water production cannot be impeded by the operation of the stipulation no matter how far well elevations drop, no matter how great the threat of sea water intruding into the basin and no matter how Basin conditions may deteriorate in any other way.** (Writ Opposition, pg. 5)
>
> In either case, **it is inarguable that Petitioners cannot in any way incur costs, be forced to modify or curtail their water production or in any other way be harmed due to the continued implementation of the stipulation** pending appeal. This fact, standing alone, warrants summary denial of the Petition. (Writ Opposition, pg 5)
>
> Since the operation of the **stipulation cannot cost Petitioners' money and cannot alter Petitioners' right to produce Basin water .....** (Writ Opposition, pg. 6)
> (Writ Opposition, pg. 7)

As clearly noted above, the Purveyor Parties admit that the Judgment was not intended to, and does not, bind Appellants. However, as noted below, the Judgment does not make clear that the Management Program does not bind Appellants. Simply adding language such as that set forth above to the Judgment After Trial would have made this clear. However, such language was not included.

Likewise, the trial court stated that the Settlement Stipulation does not bind Appellants. As the trial court explained:

> There was no intent by the court to subject the Landowner Group, the opposing parties, to any orders for directions of any Technical Group or any of the parties to the stipulation beyond what they might be subject to as - as landowners in the Santa Maria Valley Water Conservation District. (Hearing of January 25, 2008) (R.T.-1,Vol.47,pg.8331:28-8332:5)
>
> **When the court ordered some type of monitoring what the court is concerned about is knowing how much water is being produced by all the parties in the event that it becomes necessary for the court to make appropriate orders in equity as a result of water shortages.** But your

concern, I think, is misplaced because under the terms of the judgment you are not bound by any part of the stipulation of the parties who have entered into the Stipulated Agreement. (Hearing of January 25, 2008) (R.T.-1,Vol.47,pg.8332:9-18) (emphasis added)

However, as noted below, the Judgment fails to make clear that Appellants are not bound by these provisions.

(iii) The Judgment fails to make clear that Appellants are not bound by the Groundwater Monitoring Provisions and Management Area Monitoring Programs.

The Judgment provides as follows:

5. The Groundwater Monitoring Provisions and Management Area Monitoring Programs contained in the Stipulation, including Sections IV(D) (All Management Areas); V(B) (Santa Maria Management Area), VI (C) (Nipomo Mesa Management Area); and VII (1) (Northern Cities Management Area), **inclusive, are independently adopted by the court** as necessary to manage water production in the basin and are incorporated herein and made terms of this Judgment. **The Non-Stipulating Parties shall participate in, and be bound by, the applicable Management Area Monitoring Program.** Each Non-Stipulating Party **also shall monitor** their water production, maintain records thereof, and make the data available to the court or its designee as may be required by subsequent order of the Court. (Judgment, C.T.-2,Vol.1,pg.4:25-5:5)

Although the Purveyor Parties and the trial court admit that the Judgment was not intended to, and does not, impose the Groundwater Monitoring Provisions and Management Area Monitoring Programs on Appellants and admit that Appellants' only potential obligation is to monitor and provide pumping data when requested by the trial court, the language quoted above fails to make this clear. In particular, the first sentence in bold above, indicates that Appellants "shall participate in, and be bound by, the

applicable Management Area Monitoring Program." The very next sentence says that each Non-Stipulating Party "**also shall monitor,**" suggesting that monitoring is being required in addition to participating in and being bound by the Management Area Monitoring Program.

(3) The Trial Court Erred In Failing To Declare In The Judgment That Settling Parties Are Required To Comply With The Common Law As Well As Perform The Settlement Stipulation.

Combining the litigated Judgment after trial with the Settlement Stipulation, which contains provisions contrary to law, creates the false impression that the Settling Parties can ignore the provisions of the common law as they perform their agreement pursuant to the terms of the Stipulation. Compliance with the terms of their Stipulation cannot lawfully insulate them from judicial control and adjudication of water rights based upon the common law.

The Judgment must reflect that regardless of the Stipulation, the Settling Parties are nevertheless subject to control and adjudication of water rights based upon the common law. Put another way, although the Settling Parties have created a different "agreed upon rule book" to govern their inter se rights with the other Settling Parties, they still are governed and controlled by the "common law rule book" to adjudicate water rights issues between them and Appellants.

(4) The Judgment After Court Trial Should Be Separated From The Judgment Based Upon The Settlement Stipulation To Avoid Confusion And Conflicting Rights.

It is clear that the Settlement Stipulation provides Settling Parties with different rights to groundwater than the common law rights of Appellants herein. If this Court determines that the Settlement Stipulation may properly be entered as a Judgment, then in order to avoid confusion

and to assure that Appellants' common law groundwater rights are protected, the two Judgments should be separated.

At a minimum, on remand, the Judgment must make clear that the rights of the Stipulating Parties are different than the rights of the Non-Stipulating Parties, make clear that Appellants rights are not bound nor otherwise affected by the rights of the Stipulating Parties and that the rights of all parties are ultimately subject to the common law, regardless of the Stipulating Parties performance under the Settlement Stipulation.

(D) <u>The Trial Court Erred In Imposing A Physical Solution And Terms Of The Settlement Stipulation On Appellants.</u>

(1) A Physical Solution Is An Alternative To Injunctive Pumping Restrictions Otherwise Required By Strict Adherence To The Priority System, Which Requires Proof That An Injunction Should Issue.

As discussed above, California groundwater rights are based upon priority. In the event of an overdraft, the water user with the lower priority right is cut back to correct the overdraft condition. Accordingly, when an overdraft exists, water users with a higher priority groundwater right may enjoin groundwater use by those with a lower priority. *Mojave, supra,* at 1240-1241.

California Courts have recognized that strict adherence to this priority system can lead to a drastic result. A water user with a lower priority could be enjoined from using any groundwater whatsoever. As an alternative to such a harsh result, courts have allowed the use of a physical solution. *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 572.

A physical solution is a form of conditional injunction. *Rank v. Krug* (1956) 142 F. Supp. 1, 144. In other words, continued pumping by a party with a junior water right is conditionally allowed if the party with the junior

right, or the court, proposes a physical solution to the water shortage which will obviate the need to enjoin the party with the junior water right from pumping. Simply stated, a physical solution is a practical solution which avoids the drastic result which would otherwise occur if a party was completely enjoined from pumping groundwater.

Because a physical solution is a form of injunction, the procedural rules and proof required to obtain an injunction, apply to granting a physical solution. *Code of Civil Procedure* §526, which governs the issuance of an injunction provides:

> (a) An injunction may be granted in the following cases:
>
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the **relief,** or any part thereof, **consists in restraining the commission or continuance of the act** complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or **great or irreparable injury**, to a party to the action.
>
> (3) When it appears, during the litigation, that a party to the action is doing, or **threatens, or is about to do**, or is procuring or suffering to be done, **some act or violation of the rights of another party to the action** respecting the subject of the action, and tending to render the judgment ineffectual.
>
> (4) When pecuniary compensation would not afford adequate relief.
>
> (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.
>
> (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings.

(7) Where the obligation arises from a trust. . . . (Emphasis added.)

The Purveyor Parties failed to prove any of the required elements set forth above as a basis for imposition of a physical solution injunction. As discussed below, proof at trial regarding elements (2) and (3) was to the contrary. The evidence established no waste or threat of irreparable injury and no act or violation of rights based upon the conduct of Appellants. Appellants' water usage was found by the Purveyor Parties expert to be reasonable and technologically advanced. (R.T.-1,Vol.9,pg.2424:12-17) As set forth in more detail below, the Purveyor Parties clearly failed to prove an appropriate basis for an injunction.

(2) The Basis For An Equitable Physical Solution To Correct Alleged Water Shortage In A Water Basin Adjudication, Does Not Arise In The Absence Of Overdraft And Competing Claims To The Insufficient Supply.

The Purveyor Parties claimed that the Basin was in overdraft and requested a physical solution to stop the overdraft. (C.T.-1,Vol.27,pg.7005; C.T.-1,Vol.11,pg.2946:28-2947:2; C.T.-1,Vol.1,pg.246:21-24; C.T.-1,Vol.3,pg.668:25-27; C.T.-1,Vol.2,pg.274:22-275:1)

It is settled that in the absence of competing demands on an insufficient water supply, there is no basis for injunction in the form of a physical solution. As the Court noted in *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501:

> In a case like the present one, with a **relatively small quantity of water available far insufficient to meet all the needs therefore**, the Court should not grant an injunction until every reasonable physical solution, and every reasonable source of supply, has been thoroughly investigated. (Emphasis added.) (*Id.* at 556.)

Similarly, the Court in *Imperial Irrigation District v. State Water Resources Control Board,* described a physical solution as follows:

> A specialized category of criticism leveled by IID is that the Board's broad injunction overlooks the principle that it should have selected a **less drastic but practical remedy, characterized as a "physical solution."** A "physical solution" involves the application of general equitable principles to achieve **practical allocation of water to competing interests so that a reasonable accommodation of demands upon a water source can be achieved**. (See *W. Hutchins, The California Law of Water Rights* (1956) 351-354.) IID refers to the principle as a means of avoiding water waste without unreasonably or adversely affecting the rights of the parties (citing *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 290 [123 Cal.Rptr. 1, 537 P.2d 1250]) and complains that the Board attempted no such practical resolution of this matter. (*Id.* at 572.)

Finally, as this Court correctly observed in *California American Water v. City of Seaside*:

> A physical solution is an equitable remedy designed to **alleviate overdrafts** and the consequential depletion of water resources in a particular area, consistent with constitutional mandate to prevent waste and unreasonable water use and to maximize the beneficial use of this state's limited resource.
> *(Id.* at 480)

The *sine qua non* of a physical solution is the existence of conflicting demands to the water supply. As the Court in *Mojave,* noted at Page 572:

> Referring first to the specific contention regarding "physical solution": we accept the Board's rejoining analysis, as set forth on pages 28 and 29 of Decision 1600. **The concept of a "physical solution" is the accommodation of competing interests by the making of a Solomon-like decision which satisfies, to some reasonable degree, everyone's interest. The *sine quo non* of a physical solution is the existence of specific conflicting demands which can be arbitrated.** (Emphasis added.) (*Idid.*)

In the context of a groundwater adjudication, such as the underlying action, the 'conflicting demands' required for a physical solution come into existence only when overdraft occurs because, as the discussion in the prescription section above makes clear, absent overdraft sufficient water exists for all pumpers. The existence of overdraft, then, provides the legal basis for parties with senior rights to enjoin pumping of groundwater by parties with junior water rights. As explained in *California Water Service Company v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 731-732:

> The solution adopted by the trial court in this case after so many years of diligence is completely in accord with the rule of reasonable and beneficial use of water expressed by section 3 of article XIV of the state Constitution. This rule dictates that **when the supply of water is limited, as in the overdrawn basin here in question**, the public interest requires that there be the greatest number of beneficial users which the supply can yield (*Peabody v. City of Vallejo, supra*). It has also been held that under the constitutional provision, the trial court has the duty of working out a physical solution if possible and if none is suggested by the parties to work out one independently of the parties. (*Ibid.*) (Emphasis added.)

Likewise, the California Supreme Court, in its most recent decision regarding conflicting water rights in an overdrafted basin, in the case of *Mojave*, stated the following:

> Thus, water right priority has long been the central principle in California water law. The corollary of this rule is that an equitable **physical solution must preserve water right priorities** to the extent those priorities do not lead to unreasonable use. **In the case of an overdraft**, riparian and **overlying use is paramount, and the rights of the appropriator must yield to the rights of the riparian or overlying owner.** (Citations omitted.) (*Id.* at 1243.)(emphasis added)

We agree that, within limits, a trial court may use its equitable powers to implement a physical solution. (See, *e.g.*, *Peabody, supra*, 2 Cal.2d at pp. 383-384 [Court has power to make reasonable regulation for water use, {*Page*, 23 Cal.4th 1250} **provided they protect the one enjoying paramount rights**].) .... The Court observed that a physical solution is generally a practical remedy that does not affect vested rights. "Under such circumstances the 1928 constitutional amendment, as applied by this Court in the cases cited, compels the trial court, before issuing a decree curtailing such waste of water, to **ascertain whether there exists a physical solution of the problem presented that will avoid the waste, and that will at the same time not unreasonably and adversely affect the prior appropriator's vested property right.** In attempting to work out such a solution the policy which is now part of the fundamental law of the state must be adhered to." (at pp. 339-340.) In other words, "a **prior appropriator . . . cannot be compelled to incur any material expense in order to accommodate the subsequent appropriator.** (*Id.* at pp. 1249-1250.) ...**In ordering a physical solution, therefore, a Court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.** (Emphasis added.) (See, *1 Rogers & Nichols, Water for California* (1967) §404, p. 549, and cases cited. *Id.* at 1250.)

(3) To Implement A Physical Solution In Lieu Of Enjoining Junior Water Rights, There Must Be Proof Of Overdraft And The Extent Thereof, Water Right Priorities Of The Parties And Proof That The Proposed Physical Solution Will Not Impair The Rights Of, Or Cause Expense To, Parties With Senior Water Rights.

(i) Proof required to impose a physical solution.

The prescription discussion above demonstrates that in a dispute over groundwater, a legal basis must be proved to enjoin groundwater

production by water users with a lower priority right. An injunction only becomes available when overdraft exists. Because pumping must be curtailed to safe yield, the extent of the overdraft must be proved in order to determine how much pumping must be enjoined to balance the supply and correct the overdraft.

Next, the court must determine water right priorities of the parties in order to determine which water users with junior rights must cut back first to balance the demand with the supply. Parties with junior water rights who would otherwise be cut back, or the court, must consider a potential physical solution, as a practical means to avoid the harsh result of an injunction against the parties with junior rights. Finally, it must be proved that the proposed physical solution does not result in any significant expense or injury to water users with senior groundwater rights.

(ii) The Purveyor Parties failed to prove any competing demands to an overdrafted supply which is a legal prerequisite to a physical solution.

As the above cases make clear, shortage and competing demands to an overdrafted supply is a legal prerequisite to a physical solution. As discussed at length in the Prescription section, in Phase 3 the trial court found no overdraft, past or present. (Phase 3 Decision, C.T.-1,Vol.17,pg.4421:25-26) Although the trial court revisited the overdraft issue in Phase 4 and found that overdraft had existed historically, the trial court never found in any phase of trial that the supply is currently in overdraft.

The trial court found that drought might occur in the future. (Phase 5 Decision, C.T.-1,Vol.28,pg.7147:1) However, this finding does not support imposition of a physical solution. The basis for a physical solution is the existence of current overdraft and the right of the party with senior rights to an injunction to stop pumping in excess of the safe yield. Because the

Purveyor Parties failed to prove current overdraft, there was no basis for an injunction and hence no basis for a physical solution to avoid the harsh result of an injunction.

Additionally, the possibility of future drought does not create a current right to an injunction and therefore does not provide the basis for a physical solution. Further, as discussed previously, drought is not synonymous with overdraft as defined by the California Supreme Court and does not by itself give rise to the right to an injunction.

As discussed above, the Purveyor Parties elicited testimony from expert Robert Beeby in Phase 5 in support of a physical solution. The thrust of Beeby's testimony was that there was ample water. (R.T.-1,Vol.42,pg.7831:8-17) In fact he testified there was an abundance of water in the Santa Maria Basin which would last over 15 years with pumping at projected 2030 levels, even without any rainfall or other replenishment, which had never historically occurred. (R.T.-1,Vol.42,pg.7864:23-7865:5) Mr. Beeby testified that the Settlement Stipulation would be helpful in alerting the parties and the court to conditions in the supply. (R.T.-1,Vol.42,pg.7827:8-24) He did not, however, testify that the Settlement Stipulation would correct an overdraft condition, because overdraft clearly did not exist. (See generally, Beeby testimony (R.T.-1,Vol.42,pg.7804-7901).)

In summary, there was no proof of any competing claims to groundwater in an overdrafted basin and therefore no basis for an injunction or physical solution.

(iii) The Purveyor Parties failed to prove the water right priorities of the parties in order to determine which junior appropriators would be required to cut back water usage to stop overdraft.

As the legal discussion above makes clear, the purpose of a physical solution is to avoid injunction of pumping by water users with lower priority rights, while at the same time protecting the pumping of water users with priority rights. In order to fashion and evaluate a physical solution, the court must be provided with proof of the groundwater priority rights of all parties.

As discussed at length *supra* in the Purveyor Parties declaratory relief claims, the Purveyor Parties failed as a necessary part of these claims, to prove the priority rights of the parties, including overlying, prescriptive, appropriative and imported water rights. Even if overdraft had been proved as the proper basis for a physical solution, in the absence of proof of party priorities, there was no evidentiary basis to determine which parties rights would need to be cut back to stop the overdraft and no way to evaluate a physical solution to avoid enjoining those parties from pumping.

(iv) The trial court erred in entering a physical solution which fails to protect the rights of water users with senior groundwater rights.

As noted by the California Supreme Court in. *Mojave*, a physical solution must respect the priority water rights of the parties, may not unreasonably and adversely affect the rights of water users with senior groundwater rights and the party with senior rights may not be compelled to incur any material expense in order to accommodate the user with junior rights. *Id.* at 1249-1250.

The physical solution adversely affects Appellants' rights in multiple ways. The Settlement Stipulation, which is in effect the physical solution imposed by the trial court, purports to convey rights to all water from the Twitchell Reservoir to parties other than Appellants. (Settlement Stipulation, C.T.-2,Vol.1,pg.25:5-21) As discussed above, the court found that Twitchell water is native groundwater. As such this water is available

for priority use by Appellants in a time of shortage. By allocating 100% of the yield of the Twitchell Reservoir to the Settling Parties, the physical solution operates to deprive Appellants of this native water.

An equally troubling impairment of Appellants' rights arises as a result of the different method of monitoring and managing the supply set forth in the Settlement Stipulation, versus the common law requirements for monitoring and managing the supply. The Judgment After Trial is described by the trial court as a 'physical solution.' (Judgment, C.T.-2,Vol.1,pg.4:6-7) The Settlement Stipulation is incorporated into the 'Judgment After Trial' in its entirety. (Judgment, C.T.-2,Vol.1,pg.3:1-3) Accordingly, the Judgment appears to afford contractual rights of the Settling Parties' equal priority to Appellants' common law rights litigated by court trial.

By way of example, the Stipulation confers priority rights to Twitchell native groundwater to parties with junior water rights, contrary to Appellants' priority common law groundwater rights. Additionally, exportation provisions which allow Stipulating Parties to export water during times of shortage, is contrary to and impairs Appellants' water rights by reducing the amount of native groundwater available for appropriation by Appellants during times of shortage. This impairment of Appellants' rights is discussed in the section above which discusses why the Settlement Stipulation should not be reduced to a Judgment.

The Settlement Stipulation and so-called physical solution also impose differing data gathering requirements on Appellants versus stipulating parties. The Judgment provides as follows:

> Each Non-Stipulating Party also shall monitor their water production, maintain records thereof, and make the data available to the court or its designee as may be required by

subsequent order of the Court. (Judgment, C.T.-2,Vol.1,pg.5:3-5)

This provision requires only Appellants to monitor. No equivalent provision applies to the Settling Parties in the Settlement Stipulation. (Settlement Stipulation, C.T.-2,Vol.1,pg.10)

Finally, the Purveyor Parties introduced no evidence of the potential financial affect of the so-called physical solution on Appellants' groundwater rights. Clearly there will be some financial burden on Appellants incurred in complying with the terms of the physical solution including the costs of monitoring. Since the terms of the physical solution were not litigated, and are still being developed by the Settling Parties, the economic cost to Appellants has not yet been determined.

By necessity, the economic costs must be included in the proposed physical solution in order for the trial court to evaluate whether such costs will result in any "material expense" to the party with the priority rights. Finally, allowing the Settling Parties to determine the details of the program will allow the adverse Settling Parties to determine the economic impact on Appellants after the physical solution already has been imposed. Allowing the Settling Parties to make this determination would be unjust to Appellants. Accordingly, the Settlement Stipulation and Judgment fails to recognize Appellants' priority rights to water from this source and adversely affects Appellants' groundwater rights, held to be improper in *Mojave*.

(4) Even If Other Requirements For An Injunction Had Been Proved, The Trial Court Erred In Failing To Litigate The Provisions Of A Potential Physical Solution.

As noted above, the record is completely devoid of any basis to find there was an existing overdraft which would support a physical solution in

lieu of an injunction. Nevertheless, even if there had been a basis to cut back the pumping of other water users, no physical solution was proposed or litigated in the trial court. The trial court simply imposed on Appellants a so-called physical solution created by adverse parties in the Settlement Stipulation. Neither the Settlement Stipulation, nor any of its terms, were ever offered into evidence in any litigated phase of trial, even though the opportunity to propose a physical solution was invited by the court for the Phase 5 trial. (R.T.-1,Vol.40,pg.7467:12-23)

(i) The trial court failed to evaluate any physical solution as an alternative to an injunction.

As discussed above, Robert Beeby, testified in the abstract about the Settlement Stipulation. Appellants objected to this testimony as irrelevant since there was no basis for a physical solution. (R.T.-1,Vol.42,pg.7809:24-28) Nevertheless, no physical solution was offered into evidence through this or any other witness, nor were the terms of any so called physical solution introduced. Mr. Beeby admitted there was no water shortage but rather an abundant water supply. Because he offered no testimony of shortage, he offered no testimony as to how the so-called 'physical solution' created in the Settlement Stipulation would correct any overdraft. Nor did he offer any testimony regarding how the so-called physical solution would protect Appellants rights or how it would avoid injunction of pumping by parties with lower priority rights which is the function of a physical solution.

(ii) The trial court erred in imposing the Settlement Stipulation on Appellants as a physical solution in the Judgment After Trial.

In opposition to the Writ of Supersedeas to enforce the stay., the Purveyor Parties admitted that the Settlement Stipulation and Groundwater Monitoring Provisions and Management Area Monitoring Programs do not

bind Appellants. (Writ Opposition, pg. 5) However, the Judgment language is contrary, stating that Appellants are bound by these programs, as discussed elsewhere in this brief.

Even if the Judgment is clarified to reflect that Appellants are not bound in any way by the Settlement Stipulation and/or Groundwater Monitoring Provisions and Management Area Monitoring Programs contained therein, the so called physical solution in the Settlement Stipulation still impairs Appellants' groundwater rights because the so called physical solution therein was not litigated and is not consistent with Appellants' common law groundwater rights as discussed *supra*.

(iii) Even if the physical solution consists only of the provisions of the Groundwater Monitoring Provisions and Management Area Monitoring Programs, physical solution still is improper because the terms of the so called physical solution are unclear, were not litigated and are without proper purpose as a physical solution.

The Judgment is unclear. The Judgment includes definitions incorporated entirely from the Settlement Stipulation drafted by adverse parties. (Judgment, C.T.-2,Vol.1,pg.3:8-9; Settlement Stipulation, C.T.-2,Vol.1,pg.18:14-14)

The Settlement Stipulation is incorporated in its entirety into the Judgment. (Judgment, C.T.-2,Vol.1,pg.3:13) However, only the Groundwater Monitoring Provisions and Management Area Monitoring Programs are specifically referenced in the Judgment After Trial as being "independently adopted" into the Judgment. (Judgment, C.T.-2,Vol.1,pg.4:28)

Even if the entire Settlement Stipulation is not incorporated as part of the so-called physical solution, the terms and meaning of the

Groundwater Monitoring Provisions and Management Area Monitoring Programs are unclear as stand-alone provisions in the Judgment After Trial. These provisions were not litigated. Accordingly there was no opportunity to evaluate or clarify the terms. These provisions do not apply the legal standard of overdraft. Further, these provisions do not set forth any means of correcting overdraft by injunction or practical means which is the object of a physical solution.

(5) Imposing The Settlement Stipulation Or Any Of Its Terms On Appellants, Denies Appellants Of A Fundamental Property Right Without Due Process Of Law.

Because the Settlement Stipulation and the terms thereof were not litigated as between Appellants and the Purveyor Parties, imposing the Settlement Stipulation on Appellants in whole or in part would deprive Appellants of fundamental property rights without due process of law.

For example, the Settlement Stipulation fails to curtail pumping when common law overdraft occurs, exchanges for financial contribution Appellants' common law rights to water from the Twitchell Reservoir, allows exportation of water during a period of overdraft and incorporates terms and definitions inconsistent with California law.

Finally, the Judgment itself indicates that Appellants are not only bound by the Groundwater Monitoring Provisions and Management Area Monitoring Programs, but "**shall also**" monitor their pumping. (Judgment, C.T.-2,Vol.1,pg.5:3-4) As noted above, the programs have not yet been created and there is no definition of what will be required in terms of monitoring. Accordingly, monitoring required will be determined ex post facto by adverse parties, denying Appellants due process of law.

(6) The Trial Court Erred In Imposing A Physical Solution Which Is Contrary To Law, Contrary To Public Policy

And Unjust And Which Fails To Protect The Groundwater Supply.

As discussed above, the trial court may not reduce to judgment a contract between parties which is contrary to law, contrary to public policy and unjust. For the same reasons, the trial court may not enter a physical solution which is contrary to law, contrary to public policy and unjust.

(7) The Settlement Stipulation, Including The So Called Physical Solution Contained Therein, Is A Contract Between The Stipulating Parties Which, To The Extent It Can Be Enforced, Binds Only The Stipulating Parties.

The Settling Parties clearly may enter into a contract regarding their water rights *inter se*. Likewise, assuming they have proper standing and authority, the stipulating parties may agree to take action which they believe will benefit the basin. However, such actions do not create groundwater rights, do not create the proper legal and factual basis for a physical solution and do not bind Appellants. The Settlement Stipulation, whether or not it is called a physical solution, can only bind the stipulating parties.

(E) <u>Conclusions Regarding Judgment Errors And Physical Solution</u>

The Settlement Stipulation is a contract between the Settling Parties only which cannot lawfully bind Appellants in an way. There is no legal basis for a physical solution. Converting the Settlement Stipulation to a Judgment and combining it with Appellants Judgment is legally improper. Depending upon how this Court rules, Appellants request reversal and modification of the Judgment and post-trial orders as necessary including the following:

1) To confirm that the Settlement Stipulation is a contract between the Settling Parties and not a physical solution and that Appellants are not

bound nor affected by any post-trial actions of the trial court, now or in the future, with respect to the Settlement Stipulation.

2) If this Court rules that the Settlement Stipulation is simply a contract between the settling parties, to confirm that the Stipulation, including but not limited to the management and/or monitoring programs incorporated from the Settlement Agreement, do not bind or otherwise affect Appellants.

3) If this Court rules that the Settlement Stipulation is simply a contract between the settling parties and not a physical solution, to confirm that the trial court's role in the Stipulation is limited to hearing disputes between the settling parties about the meaning of the contract and to enforce the contract against settling parties which fail to perform.

4) If this Court rules that the Settlement Stipulation is simply a contract between the settling parties, to confirm that notwithstanding the Settlement Stipulation, the Settling Parties are bound by the common law, including but not limited to, determination of overdraft and limitation of pumping based upon priority of groundwater rights during overdraft, as articulated by the California Supreme Court.

5) If this court confirms that the Settlement Stipulation is simply a contract between the Settling Parties, to confirm in the Judgment and in the post-trial orders, that such post-trial orders related to the Stipulation are not findings of the court based upon evidence and the law, that these orders do not obviate the need for the Settling Parties to properly comply with environmental laws, that such orders apply to the Stipulating Parties only and that such orders do not bind, nor have any evidentiary or persuasive affect on any third party, entity or governmental body.

6) If this Court rules that the Settlement Stipulation, or any part of it, is a physical solution, to require that any management and/or monitoring programs implementing a physical solution or orders of the trial court related thereto, reflect the common law standard of overdraft and require that the physical solution protect water rights of the parties and protect the basin by applying the California priority system.

7) If this Court concludes that the Settlement Stipulation, or any part thereof, is a physical solution, that all parties including Appellants, have an equal right to involvement in the physical solution process, that all aspects of the physical solution will be subject to an evidentiary hearing regarding any and all terms thereof, and that the trial court will issue written rulings based upon the law and the evidence regarding all aspects of the physical solution.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT WITHOUT PROPER IDENTIFICATION OF PROPERTIES SUBJECT TO THE JUDGMENT BY LEGAL DESCRIPTION AND WITHOUT REQUIRING PROMPT RECORDATION RESULTING IN A JUDGMENT WHICH CANNOT EFFECTIVELY BE ENFORCED UNDER CONTINUING JURISDICTION

Proper identification of real property is critical to judgments of adverse possession and/or prescription as against such property. Without proper identification of a parcel of real property in the judgment, significant confusion will result. The recordation statutes which are designed to give subsequent purchasers of property notice of ownership and/or prescriptive rights encumbering such property, depend upon proper legal description of the property and of the encumbrance.

(A) The Trial Court Failed To Properly Identify Properties Subject To The Judgment By Legal Description.

Appellants properly identified their properties subject to the judgment by legal descriptions. (Judgment, Exhibit, C.T.-2,Vol.2,pg.436-533) However, numerous other properties subject to the combined judgment are not identified by legal description in the Judgment and are identified only by APN number. (Judgment, Exhibit, C.T.-2,Vol.1,pg.155:-Vol.2, pg. 332)

APN numbers are not sufficient to identify the real property subject to the underlying judgment. APN numbers change over time. Failing to identify the real property bound by the Judgment by legal description will invite future confusion, potential litigation and enforcement problems. It will be virtually impossible to effectively identify the real property parcels subject to the combined judgment ten to twenty years in the future because the APN numbers probably will change.

(B) Prompt Recordation Of The Judgment As Against Real Property Identified By Legal Description Is Critical To Effectively Enforcing The Judgment Under The Trial Court's Continuing Jurisdiction.

Continuing jurisdiction of the trial court requires that subsequent purchasers of property be bound by the Judgment. Recordation of the Judgment in the line of title is critical to give notice to subsequent purchasers of the Judgment and of the affect of the Judgment on property subject to the Judgment. The Judgment attempts to require subsequent purchasers to identify subsequent transferees of properties as follows:

> Any party, or executor of a deceased party, who transfers property that is subject to this judgment shall notify any transferee thereof of this judgment and shall ensure that the judgment is recorded in the line of title of said property. (Judgment, C.T.-2,Vol.1,pg.8:11-14)

Transfer of property may not happen for ten to twenty years or more. It is likely that the terms and the provisions of the Judgment will not be remembered at the time property is transferred. Delayed recordation will cause problems with identification because APN numbers will likely change over time.

Recordation laws recognize the importance of prompt and accurate recordation of property encumbrances and transfers. Delayed recordation will increase the likelihood that recordation will not occur. In fact, it will be impossible to track and confirm whether recordation occurs or not. This is so because there will be no way for a litigant to know if property is transferred, let alone whether notice was given to the transferee of a non recorded Judgment. There will be no effective mechanism to determine whether property changes hands unless a party reports this.

Appellate Courts have ordered trial courts to review matters requiring legal descriptions. As the Court in *Golden West Baseball Company v. City of Anaheim* (1994) 25 Cal.App.4th 11, 52, stated:

> The description of the premises should be amended to add the legal description of the orangewood exclusion, the Wagner-Michael property, and the state exclusions. . . . (*Ibid.*)

Likewise, the Judgment must be clear as to what parcels are bound so that others, including parties to the Judgment, may enforce the Judgment and give notice of the provisions of the Judgment which may affect title to property. As the Court noted in *People v. Rio Nido Co., Inc.* (1938) 29 Cal.App.2nd 486:

> One whom it is sought to bind by a judgment is not required to seek beyond the judgment role, nor to indulge in surmise. (*Id.* at 491, foot note 2)

Finally, as the Court in *People v. Rio Nido Co., Inc.* noted:

> It is essential that a judgment, particularly one affecting real property, be specific and certain in its identity of the lands affected. It must be so certain that a stranger may be able to clearly identify the particular tract. This elementary requirement is, we think, undisputed. (Id. at 489)

The result of failure of the Judgment to require prompt recordation by proper legal description is that the trial court likely will lose jurisdiction over numerous properties as the years go by. This will result in subsequent litigation between future transferees who will claim lack of notice of the Judgment as holders in due course, a virtual impossibility of getting all parties before the court necessary to enforce the Judgment and to protect the water basin and great confusion.

Appellants request this Court order modification of the Judgment to include identification of all properties by legal description and to order recordation of the Judgment after the appeal is final, in the line of title for all properties affected by the Judgment.

THE TRIAL COURT ERRED BY DECLARING SOME OF THE PURVEYOR PARTIES TO BE "PREVAILING PARTIES" UNDER CALIFORNIA *CODE OF CIVIL PROCEDURE* §1032

The trial court erred by declaring the Golden State, Santa Maria and the Northern Cities Prevailing Parties (hereinafter "Prevailing Parties") (C.T.-4,Vol.6,pg.1600:8-10) on the theory that they recovered non-monetary relief on their cross-complaints against Appellants. The trial court's June 6, 2008 Order found, that the Prevailing Parties "prevailed on **only** their contentions and assertions that they are entitled to return flows and they were entitled to a prescriptive right..." (emphasis added)(C.T.-4,Vol.6,pg.1599-1600) Nevertheless, the trial court determined "[t]here is a large amount of this case that neither party prevailed on, or you could say both parties prevailed on, and that's a discretionary area." (R.T.-2,Vol.1,pg.40:19-21) The trial court further determined that "costs are

discretionary with the court inasmuch as there was a non-monetary recovery in this case." (R.T.-2,Vol.1,pg.105:28–106:2)

The trial court determined that Appellants were responsible for 10 percent of the costs incurred by the "prevailing parties" in Phases 1 through 3 and 50 percent of the reasonable costs incurred during Phases 4 and 5. (R.T.-2,Vol.1,pg.107–108) Subsequent to the trial court's determinations on the parameters of the cost award, Appellants' motions to tax costs were granted in part and denied in part. (C.T.-4,Vol.9,pg.2164-2172) Ultimately, the Prevailing Parties were awarded costs of approximately $100,000.00 against Appellants. *(Ibid.)* The trial court abused its discretion by designating the Prevailing Parties as prevailing parties, apportioning costs incorrectly and thereafter awarding costs.

(A) <u>The Prevailing Parties Are Not Entitled To Costs As A Matter Of Right.</u>

The trial court did not find that the Prevailing Parties received a "net monetary recovery" within the meaning of *Code of Civil Procedure* §1032(a)(4). They were merely accorded some non-monetary relief. Where the prevailing party is one not specified within the categories of *Code of Civil Procedure* §1032(a)(4), an award of costs is discretionary. The trial court must determine the prevailing party and then exercise its discretion in awarding costs. *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248–1249; *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105. The second prong of the statute thus "permits [a] ruling … ordering each side to pay its own costs, even [where] Appellants were without question the prevailing parties"—having sought and obtained non-monetary declaratory relief. *Ibid.* This prong of the statute thus requires the trial court to exercise its discretion both in determining the prevailing party and in determining whether to award costs, as an express statutory exception to the general rule that a prevailing party is entitled to

costs as a matter of right. *Code of Civil Procedure* §1032(b). As noted below, the trial court abused its discretion in awarding costs. Because the non-monetary relief awarded was insignificant, all parties should have borne their own costs.

(B) <u>The Policy Underlying An Award Of Costs Supports A Determination That Appellants Are A Prevailing Party For Purposes Of An Award Of Costs.</u>

The policy underlying award of costs is based upon the notion that although any person or entity has the right to file a lawsuit and complain against any other person or entity, the party making such claim and complaint should pay the litigation costs of the party defending the claims brought if the party bringing the action does not prevail on the claims and causes of action asserted. *Code of Civil Procedure* §1032(b). The Purveyor Parties filed cross-complaints against Appellants. Appellants filed cross-complaints against the Purveyor Parties, which includes the Prevailing Parties, requesting quiet title relief. Appellants successfully defended against almost all of the claims of the Purveyor Parties. As such, the Prevailing Parties were accorded no significant non-monetary relief and either Appellants should be awarded costs, or each party should bear its own costs. *McLarand, Vasquez & Partners v. Downey Sav. & Loan Ass'n* (1991) 231 Cal. App. 3d 1450, 1454 (under *Code of Civil Procedure* §1032, "when neither the plaintiff nor the defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs.").

(C) <u>Appellants Were The Prevailing Party.</u>

As noted above, the rationale supporting an award of costs to a prevailing defendant is that such party was forced to defend against complaint allegations which ultimately were not proven by the complaining party. Each of the Prevailing Parties who were awarded costs, filed cross-complaints against Appellants. Appellants' quiet title

actions were defensive in nature, seeking to quiet title against claims of prescription and other claims being made by the Prevailing Parties against Appellants' property rights. Analysis of the allegations brought by the Prevailing Parties and review of the Judgment reveals that the trial court erred in determining that the Prevailing Parties prevailed in the underlying action.

(D) The Prevailing Parties Cross-Complaints.

As discussed in detail supra, the Prevailing Parties claimed but failed to prove many of the claims in their cross complaints. The trial court denied or failed to award any relief on Cost Recovering Party claims including, but not limited to, current overdraft, the groundwater rights of all parties, Twitchell rights, equitable priority rights, municipal priority rights and the request for an injunction to prevent pumping by any party in excess of that parties groundwater rights. Additionally, the prescriptive relief awarded was described by the trial court as "de minimus" as discussed supra.

Finally, since the so-called Northern Cities is not a legal entity, it is not entitled to an award of costs. And additional error exists that flows from the lumping of four separate entities as Northern Cities. These entities are not entitled to collective relief because the facts applicable to each differs. Only Pismo and Oceano were found to have return flows and none were found to have a prescriptive right. Each should receive relief only as the facts and the law provide. The analysis of costs must be likewise made on an individual basis.

(E) Appellants Were The Prevailing Party In Phases 1 Through 3.

Appellants and all of the other overlying landowners who were in the case at the time, defended the matter against the Purveyor Parties claims during Phases 1, 2 and culminating in Phase 3. In the decision following Phase 3, the court clearly articulated that no past or present

overdraft was proved by the Purveyor Parties. (Phase 3 Decision, C.T.-1,Vol.17,pg.4412:8-9) The landowner parties defeated the Purveyor Parties claims of overdraft. Accordingly, Appellants as one of those parties, was a prevailing party as to the issues determined in Phases 1-3.

The trial court concluded:

> I am mindful of the fact that the Santa Maria Water Conservation District initiated this litigation and sought declaratory relief. And the main battle for three phases in this case was between the water conservation district and the purveyors, the City of Santa Maria and the other companies. And that's where most of the effort went. (R.T.-2,Vol.1,pg.106:4-11)

Nonetheless, the trial court determined that Appellants should be responsible:

> for about 10 percent of the costs for the first three phases. (R.T.-2,Vol.1,pg.107:4-6)

In its Order, the trial court sought to use its discretion to fairly apportion costs in its award to the Purveyor Parties.

> I am breaking it down by attempting to apportion among the parties what is a just share of the costs that ought to be awarded to the prevailing parties. (R.T.-2,Vol.1,pg.106:28-107:3)

The trial court's determination that Appellants were responsible for 10 percent of the costs expended by the Purveyor Parties is an abuse of discretion. The Purveyor Parties prevailed on no issues determined in the Phase 1 through 3 proceedings. Order After Hearing Re: Trial (Phase 2) (Phase 2 Decision, C.T.-2,Vol.1,pg.55); Appeal Partial Statement of Decision Re Trial Phase 3, C.T.-1,Vol.17,pg.4409.

Furthermore, it is clear that whether or not Appellants participated in Phases 1 through 3, the Purveyor Parties would have incurred whatever

costs they incurred pursuing their causes of action and claims against the other landowner parties. Accordingly, the trial court erred in awarding certain Purveyor Parties costs incurred during Phases 1 through 3.

(F) Reversal Of The Judgment Compels Reversal Of The Costs Award.

"An order awarding costs falls with reversal of the judgment on which it is based." *Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402. Accordingly, should this Court reverse the basis for the trial court's determination that certain Prevailing Parties were prevailing parties, the award costs would be reversed as a matter of course.

THE TRIAL COURT ERRED IN GRANTING POST-TRIAL ORDERS

After Appellants filed the appeal of the main action, the Purveyor Parties requested court 'approval' of various actions taken, and documents submitted, in an attempt to move forward with the Groundwater Monitoring Provisions and Management Area Monitoring Programs adopted by the trial court in the Judgment. These post-trial judicial actions included orders approving Management Plans for the Nipomo Mesa, Northern Cities and Santa Maria Areas of the Santa Maria Water Basin. The trial court approved these actions and accepted the filing of documents, allowing the Purveyor Parties to proceed with these Judgment programs notwithstanding the stay on appeal. The orders appealed from and the Appellants' objections in the trial court are as follows:

- Nipomo Plan (C.T.-4,Vol.9,pg.2160; C.T.-6,Vol.1,pg.142)
- Northern Plan (C.T.-4,Vol.9,pg.2163; C.T.-6,Vol.1,pg.142)
- Nipomo Response (C.T.-6,Vol.1,pg.152; C.T.-6,Vol.1,pg.142)
- Santa Maria (C.T.-11,Vol.1,pg.73; C.T.-11,Vol.1,pg.47)

(A) The Trial Court Erred In Proceeding With Approval Of The Groundwater Monitoring Provisions And Management Area Monitoring Programs Because Of The Stay Attendant To Appeal Of The Underlying Action.

Appellants objected to these post-trial orders on the grounds that the automatic stay attendant to the filing of the Appeal in the underlying matter, stayed court action approving these management programs, or any activities related thereto, pending appeal. (C.T.-6,Vol.1,pg.144:16-17)

Code of Civil Procedure §916 provides as follows:

> (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the **perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby**, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order. (Emphasis added.)

The court overruled these objections and proceeded with various post-trial proceedings approving these programs and actions related thereto.

(B) Appellants Filed A Writ With This Court To Enforce The Stay.

Appellants filed a Writ of Supersedeas with this Court to stop the Purveyor Parties from proceeding with the Monitoring and Management Plans adopted by the trial court in the Judgment. (Writ Petition) As discussed above, this Court denied the Writ. However, because of language in the Judgment stating that Appellants are bound by the management and monitoring programs, Appellants appealed the foregoing post-trial orders in order to have this Court order modification of the Judgment to remove all language indicating or suggesting that Appellants are bound by the Settlement Stipulation or the programs contained therein or to reverse the post-trial orders and actions of the trial court.

(C) The Trial Court Erred In Accepting Documents And Approving Actions To Implement The Groundwater Monitoring Provisions And Management Area Monitoring Programs.

The arguments made by Appellants regarding converting the Settlement Stipulation to Judgment and combining the Settlement Stipulation and the included Groundwater Monitoring Provisions and Management Area Monitoring Programs with Appellants' Judgment after court trial, are incorporated herein as the basis for why the post-trial orders should be reversed.

RELIEF REQUESTED

Appellants request this Court reverse the Judgment and post-trial orders consistent with the arguments herein. Reversal of a judgment in favor of a plaintiff for insufficiency of the evidence will not give rise to a right to a new trial. *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657. Accordingly, reversal should be without right of retrial on all claims which were unproved by the Purveyor Parties. Appellants request this Court order the trial court to modify the Judgment and post-trial orders based upon this Court's rulings on Appellants' arguments herein.

Appellants request this Court order the trial court to enter Judgment on all causes of action litigated, order judgment against the Purveyor Parties on claims they failed to prove, order that the Judgment declare the rights of all parties, including Appellants' priority overlying right, as requested in the pleadings, declare defaulting parties and disclaiming parties, include legally correct definitions and reverse the judgment of costs against Appellants. Appellants request the court order modification of the Judgment and post-trial orders consistent with the common law and for such other and further relief as this Court deems just and proper.

CERTIFICATE OF WORD COUNT

(California *Rules of Court*, Rule 8.204(c)(1))

The text of this brief consists of approximately 39,344 words as counted by Microsoft Office Word 2003 Program used to generate this brief.

Dated: September 9, 2010

Respectfully submitted,

CLIFFORD & BROWN

By: _____

RICHARD G. ZIMMER, ESQ.
Attorneys for Appellants

PROOF OF SERVICE (C.C.P. §1013a, 2015.5)

Santa Maria Valley Water Conservation District v. City of Santa Maria

Lead Case No. **1-97-CV770214** [Consolidated With Case Numbers: CV784900, CV784921, CV784926, CV785509, CV785511, CV785515, CV785522, CV785936, CV786971, CV787150, CV787151, CV787152, CV790597, CV790599, CV790803, CV 790741, San Luis Obispo County Superior Court CV790597, CV790599, CV790803]

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA 93301.

On September 13, 2010, I served the foregoing document(s) entitled:

APPELLANTS LANDOWNER GROUP PARTIES' ("LOG") OPENING BRIEF

XX by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

__ by placing _ the original, _ a true copy thereof, enclosed in a sealed enveloped addressed as follows:

E. STEWART JOHNSTON (State Bar No. 158651)
1363 West Main Street
Santa Maria, CA 93458
Telephone: (805) 680-9777
Attorneys for Cross-Defendants and Cross-Complainants, **LANDOWNER GROUP PARTIES (LOG)**

TED R. FRAME (State Bar No. 023736)
RUSSELL MATSUMOTO (State Bar No. 084949)
FRAME & MATSUMOTO
P.O. Box 895
Coalinga, CA 93210
Telephone: (559) 935-1552
Facsimile (559) 935-1555
Attorneys for Cross-Defendants and Cross-Complainants, **ADAM AGRICULTURAL LIMITED PARTNERSHIP; MILI AND BARBARA ACQUISTAPACE, AS TRUSTEES OF THE ACQUISTAPACE 2003 FAMILY TRUST, DATED DECEMBER 31, 2003; GEORGE J. ADAM; JOHN F. AND DENA ACQUISTAPACE ADAM, AS TRUSTEES OF THE ADAM FAMILY TRUST; MARK S. ADAM; CHRISTINE M. CRUDEN; B. PEZZONI ESTATE COMPANY; RICHARD L. AND JANET A. CLARK, AS TRUSTEES OF THE RICK AND JANET CLARK FAMILY TRUST DATED SEPTEMBER 24, 1986; EDWARD S. WINEMAN; CAROL BROOKS; FRED W. AND NANCY W. HANSON, AS CO-TRUSTEES OF THE HANSON REVOCABLE TRUST; AND HELEN J. FREEMAN**

ROBERT J. SAPERSTEIN (State Bar No. 166051)
STEPHANIE OSLER HASTINGS (State Bar No. 186716)
BROWNSTEIN HYATT FARBER & SCHRECK, LLP
21 E. Carrillo Street
Santa Barbara, CA 93101
Telephone: (805) 963-7000
Facsimile: (805) 965-4333
Attorneys for Defendants, Cross-Complainants and Cross-Defendants, **GOLDEN STATE WATER COMPANY** and **RURAL WATER COMPANY**

ERIC L. GARNER (State Bar No. 130665)
JEFFREY V. DUNN (State Bar No. 131926)
JILL N. WILLIS (State Bar No. 200121)
BEST BEST & KRIEGER LLP
3750 University Avenue, Suite 400
Riverside, CA 92502
Telephone: (951) 686-1450
Facsimile: (951) 686-3083
Attorneys for Defendant and Cross-Complainant, **CITY OF SANTA MARIA** and **CENTRAL COAST WATER AUTHORITY**

JAMES L. MARKMAN (State Bar No. 43536)
STEVEN R. ORR (State Bar No. 136615)
RICHARDS, WATSON & GERSHON
355 South Grand Ave., 40th Floor
Los Angeles, CA 90071-3101
Telephone: (213) 626-8484
Facsimile: (213) 626-0078
Attorneys for Defendant and Cross-Defendant, **NIPOMO COMMUNITY SERVICES DISTRICT**

HENRY S. WEINSTOCK (State Bar No. 89765)
NOSSAMAN, GUNTHER, KNOX & ELLIOT, LLP
445 South Figueroa Street, 31st Floor
Los Angeles, CA 90071
Telephone: (213) 612-7800
Facsimile: (213) 612-7801
Attorneys for Defendants, **CITY OF ARROYO GRANDE, CITY OF GROVER BEACH, CITY OF PISMO BEACH** and **OCEANO COMMUNITY SERVICES DISTRICT**

MARK J. MULKERIN (State Bar No. 166361)
BURKE, WILLIAMS & SORENSEN, LLP
4 Park Plaza, Suite 850
Irvine, CA 92614
Telephone: (949) 863-3363
Facsimile: (949) 863-3350
Attorneys for Cross-Defendant **CITY OF GUADALUPE**

JANET K. GOLDSMITH (State Bar No. 065959)
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD,
A Professional Corporation
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
Attorneys for Cross-Defendant **County of San Luis Obispo** and Cross-Defendant **San Luis Obispo County Flood Control and Water Conservation District**

STEPHEN SHANE STARK, COUNTY COUNSEL (State Bar No. 63779)
STEPHEN D. UNDERWOOD, Chief Assistant (State Bar No. 63057)
County of Santa Barbara
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101
Telephone: (805) 568-2950
Facsimile: (805) 568-2982 X
Attorneys for Defendants and Cross-Defendants **County of Santa Barbara, Santa Barbara County Flood Control and Water Conservation District** and/or the **Santa Barbara County Water Agency**

SANTA CLARA COUNTY SUPERIOR COURT (1 Copy)
Appellate Division
19 North First Street
San Jose, CA 95113

CALIFORNIA SUPREME COURT (4 Copies)
350 McAllister Street
San Francisco, CA 94102

X **BY SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER 27, 2005.**

X **BY MAIL**

__ I deposited such envelope in the mail at Bakersfield, California, with postage thereon fully prepaid.

X I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business. The above sealed envelopes were placed for collection and mailing on the above date following ordinary business practice.

__ **BY EXPRESS MAIL**
I deposited such envelopes in a facility regularly maintained by the U.S. Postal Service for receipt of Express Mail, as specified in C.C.P. §1013(c), with Express Mail postage prepaid.

__ **BY OVERNIGHT DELIVERY** (other than Express Mail)
I deposited such envelopes in an envelope or package designated by the express service carrier with delivery fees paid or provided;

__ and deposited such envelope or package in a facility regularly maintained by the express service carrier.

__ delivered such envelope or package to an authorized courier or driver authorized by the express service carrier to receive documents.

__ **BY PERSONAL SERVICE**
I caused such envelope to be hand delivered to the offices of the addressee(s).

__ **BY FACSIMILE**
I transmitted the above-referenced documents by facsimile to the interested parties as listed below.

Executed on September 13, 2010, at Bakersfield, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

ROSEMARY MYERS
55100-2

PROOF OF SERVICE (C.C.P. §1013a, 2015.5)

Santa Maria Valley Water Conservation District v. City of Santa Maria

Lead Case No. **1-97-CV770214** [Consolidated With Case Numbers: CV784900, CV784921, CV784926, CV785509, CV785511, CV785515, CV785522, CV785936, CV786971, CV787150, CV787151, CV787152, CV790597, CV790599, CV790803, CV 790741, San Luis Obispo County Superior Court CV790597, CV790599, CV790803]

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA 93301.

On September 13, 2010, I served the foregoing document(s) entitled:

APPELLANTS LANDOWNER GROUP PARTIES' ("LOG") OPENING BRIEF

XX by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

__ by placing _ the original, _ a true copy thereof, enclosed in a sealed enveloped addressed as follows:

ATTN: WILLIAM MAGSAYSAY
OFFICE OF THE CLERK (Original, 4 Duplicate Originals & 4 Copies)
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

X **BY SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION PURSUANT TO CLARIFICATION ORDER DATED OCTOBER 27, 2005.**

__ **BY MAIL**

__ I deposited such envelope in the mail at Bakersfield, California, with postage thereon fully prepaid.

__ I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business. The above sealed envelopes were placed for collection and mailing on the above date following ordinary business practice.

__ **BY EXPRESS MAIL**
I deposited such envelopes in a facility regularly maintained by the U.S. Postal Service for receipt of Express Mail, as specified in C.C.P. §1013(c), with Express Mail postage prepaid.

X **BY OVERNIGHT DELIVERY** (other than Express Mail)
I deposited such envelopes in an envelope or package designated by the express service carrier with delivery fees paid or provided;

__ and deposited such envelope or package in a facility regularly maintained by the express service carrier.

X delivered such envelope or package to an authorized courier or driver authorized by the express service carrier to receive documents.

__ **BY PERSONAL SERVICE**
I caused such envelope to be hand delivered to the offices of the addressee(s).

__ **BY FACSIMILE**
I transmitted the above-referenced documents by facsimile to the interested parties as listed below.

Executed on September 13, 2010, at Bakersfield, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Rosemary Myers

ROSEMARY MYERS
55100-2